

BOUNDARY PROBLEMS RELATING TO THE DELIMITATION
OF THE CONTINENTAL SHELVES OF THE TIAO YU TAI,
NANSHA AND HSISHA ISLANDS

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Three Volumes



To My Parents - Mr. & Mrs. Joseph Chao

With thanks for their patience and
understanding.

獻給我的母親

前中國海關稅務司主任

趙承緒 先生
夫人

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 Alaska Boundary Case [1903] XV RIAA 481
 Anglo-French Continental Shelf Arbitration [1978] Cmd. 7438
 Anglo-Norwegian Fisheries Case [1951] ICJ Reports 116
 Anna, The (1805) 5C. Rob.373
 Antarctica Case [1956] ICJ Reports 12-14, 15-17
 Arbitral Award made by the King of Spain on 23 December
 1906 [1960] ICJ Reports 192
 Arbitration concerning Buraimi and the Common Frontier between
 Abu Dhabi and Saudi Arabia [1949] FO/E 14598/1081/25
 Argentina-Chile Frontier Case [1988] XVI RIAA 109
 Attorney General v. Chambers (1854) All E.R. Rep (1843-1860)
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 Barcelona Traction Light and Power Company Ltd. (Preliminary
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 Barcelona Traction (Second Phase) [1970] ICJ Reports 3
 Barotseland Boundary Arbitration [1905] XI RIAA 59
 Beagle Channel Arbitration (Argentina-Chile) [1977] 52 ILR 97
 Behring Sea Fur Seal Arbitration (1895) Report of the
 Proceedings of the Tribunal of Arbitration 1895
 Bonser v. La Macchia [1969] 51 ILR 39
 Brazil- British Guiana Boundary [1904] XI RIAA p.11
 British Guiana-Venezuela Boundary Arbitration (1897) 89 BFSP
 57
 B.P. v. Libyan Arab Republic [1973 & 1974] 53 ILR 300
 Bulama Island Arbitration (Great Britain-Portugal)(1870)
 Recueil des arbitrages internationaux II 604
 Calvin's Case (1608) 77 E.R. 377
 Caroline Islands Arbitration (1885) USFR (1886) 776
 Cayuga Indians Claim Case [1926] VI RIAA 173
 Chamizal Boundary Arbitration [1911] XI RIAA 309
 Chevreau Case [1931] II RIAA 1113
 Chorzow Factory (Merits) Case [1928] PCIJ Ser. A No. 13
 Church v. Hubbart 6 US (2 Cranch) 187 (1804)
 Church v. Meeker 34 Conn. 421
 Clipperton Island Arbitration [1931] 2 RIAA 1105
 Colombia-Venezuela Boundary Arbitration [1922] I RIAA 223
 Continental Shelf (Tunisia-Libyan Arab Jamahiriga), case
 concerning the [1982] ICJ Report 18
 Corfu Channel [1949] ICJ Reports 4
 Danzig (Proceedings Before the High Commissioners) Case
 [1934] 7 Annual Digest 1933-34 Case No. 25 61
 Dare v. Heathcote (1856) 25 L.J. Ex.245
 Delagoa Bay Railway Arbitration [1900] 66 BFSP 554

- Delimitation of the Polish-Czechoslovakian Frontier (Question of Jaworzina) (Advisory Opinion) Case [1923] PCIJ Series B No. 8
- Delimitation of the Serbo-Albanian Frontier (Question of Monastery of Sain Naoum) Case [1924] PCIJ Series B No. 9
- Earl of Lonsdale v. Attorney General [1982] Ch.10 TLR 19 January 1982
- Eastern Greenland, Legal Status of [1933] PCIJ Ser.A/B No. 53
- Electricity Company of Sofia and Bulgaria Case [1939] PCIJ Ser. A/B No. 77
- Fama, The (1804) 5 C Rob. 106
- Fisheries Jurisdiction (U.K. v. Iceland) Merits [1947] ICJ Reports 3
- Foster v. Nielson (1829) 2 Peters 253
- Fowkes v. London and Manchester Assurance Association (1863) 3 B. & S. 917
- Free Zones of upper Sovoy and the District of Gex [1932] PCIJ Ser. A/B No. 46
- Frontier between Turkey and Iraq (Mosul Boundary) case [1925] PCIJ Ser. B No. 12
- Frontier Land Case [1959] ICJ Reports 209
- Garcia Cadiz Case Moore International Arbitrations IV 4199
- Garcia v. Lee, 12 Peters 511
- Gertini Case 3 Venezuelan Arbitrations of 1903 720
- German Interests in Polish Upper Silesia (Merits) [1926] PCIJ Ser. A No. 7
- Grisbardarna Arbitrations [1909] XI RIAA 147
- Guatemala-Honduras Boundary Arbitration [1933] II RIAA 1322
- Gulf of Fonseca 11 AJIL [1917] 674
- Handly's Lessee v. Anthony 18 US (5 Wheat) 374 (1820)
- H.M. Attorney General for British Honduras v. John Bristowe and Charles Thomson Hunter (1880) L.R.6 App.Cas. 143
- Honduras-Nicaragua Boundary Case [1905] XI RIAA 101
- I'm Alone, The [1935] 3 RIAA 1609
- Indiana v. Kentucky 136 US 479 (1890)
- Iowa v. Illinois 147 US 1(1893)
- Islands of Aves Arbitration (the Netherlands-Venezuela)(1857) Recueil des arbitrages internationove II 408
- Island of Lance Arbitration, Moore International Arbitration V. 4940
- Island of Palmas Arbitration [1928] II RIAA 829
- Island of Timor Arbitration [1914] 9 AJIL (1915) 240
- Japanese House Tax Case [1905] XI RIAA 51
- Joyce v. DPP [1946] A.C. 347
- Labrador Boundary, Re [1927] 137 L.T.R. 187
- Lake Lanoux Arbitration [1957] 24 ILR 101
- Lake Oeil de la Mer (or Meerauge) Arbitration 8 RDILC [1906] 196
- Le Louis, Forest (1817) 2 Dods. 210
- Lighthouses in Crete and Somas [1937] PCIJ Ser. A/B No. 71

- Lord Advocate v. Clyde Navigation Trustees (1891) 19 S.C.
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 Lord Advocate v. Wemyss [1900] A.C.48
 Lotus [1927] PCIJ Ser. A No.10
 Louisiana v. Mississippi 202 US 1 (1906)
 Lubeck v. Mecklenburg-Schwerin (1925) 3 Annual Digest
 (1925-26) Case No. 85 114-15
 Manchester v. Massachusetts 139 US 240 (1891)
 Maria, The (1799) 1 C.Rob. 340
 Matson Navigation Co. and Union Oil Co. of California v.
 U.S. 135 Ct. Cl. 526 (1956) 141 F. Supp. 229
 Mavromattis Palestine Concessions Case [1924] PCIJ Ser. A
 No. 2
 Menzel v. Liszt 49 Misc. 2d 300 267 N.Y.S. 2d 804 (Supt. Ct.
 1966)
 Michigan v. Wisconsin 270 US 295 (1926)
 Minnesota v. Wisconsin 252 US 273 (1920)
 Minquiers and Ecrehos Case [1953] ICJ Reports 47
 Missouri v. Nebraska 196 US 23 (1904)
 Mortensen v. Peters [1906] 8 F(J) 93
 New Jersey v. Delaware 291 US 361 (1934)
 Muscat Dhows Case [1905] XI RIAA 83
 New South Wales and Others v. Commonwealth of Australia
 [1975] 51 ILR 89
 North Atlantic Coast Fisheries Arbitration, The [1910] XI
 RIAA 167
 North Sea Continental Shelf Cases [1969] ICJ Reports 3
 Nuclear Tests Case (Australia v. France) [1974] ICJ Reports
 253
 Orinoco S.S. Co. Case [1910] II RIAA 227
 Paquete Habana, The (1900) 175 US 677
 Parker v. Lord Advocate [1904] A.C.364
 Paszthy v. Kasulokoff A.D. 1919-42 (Supplementary Vol.) No.41
 Petroleum Development Ltd. v. Sheikh of Abu Dhabi Arbitration
 [1951] 18 ILR Case No. 37 144
 Petroleum Development (Qatar) Ltd. v. Ruler of Qatar [1950]
 18 ILR Case No. 38 161
 Pionke v. R. [1957] 3 WLR 859
 Pious Fund Case [1902] IX RIAA 1
 Pope et al v. Blorton County Judge et al 10F Supp. 18 (1935)
 Pope v. Blorton 229 US (1936)
 Post Office v. Estuary Radio Ltd. [1968] 2 Q.B. 740 at 753
 Railway Traffic between Lithuania and Poland, Case Concerning,
 [1931] PCIJ Ser. A/B No. 42
 Rainy River by Roiry Lake River Boom Corporation v. Roiry
 River Lumber Co. [1912] 27 OLR 131

- Rann of Kutch (1968) 50 ILR 2
 Raptis v. South Australia (1977) 15 ALR 223
 R. v. Keyn (1876) 2 Ex.D. 63
 Reservations to the Convention on the Prevention and Punishment
 of the Crime of Genocide (Advisory Opinion) [1951] ICJ
 Reports 15
 Right of Passage over Indian Territory Case [1960] ICJ Reports
 6
 Saar Territory (Trade Marks) Case, Germany, Upper Court of Hamm
 May 7, 1934, 7 Annual Digest 1933-34 Case No. 24 59
 St. Croix River Case, The (1798) Moore Int. Arbitrations I
 1-43
 Sarropoulos v. Bulgarian State, Gresco Bulgarian Mixed
 Arbitral Tribunal, 14 February 1927, 4 Annual Digest (1927-
 28) Case No. 173 263
 Saudi-Arabia v. Arabian American Oil Co. (Aramco) [1958] 27
 ILR 117
 Savarkar Case [1911] XI RIAA 243
 Schooner Exchange v. McFaddon II US (7 Cranch) 116 (1812)
 Secretary of State for India v. Chelikani Rama Rao [1916] 32
 TLR 652
 Serbian Loans Case [1929] PCIJ Ser. A Nos. 20-21
 Shimabukuro and Others, Re (1966 & 1967) 54 ILR 214
 South West Africa Cases (Second Phase) [1966] ICJ Reports 6
 State of South Australia v. The State of Victoria (1911) 12
 CLR 662
 Tatarko, In re [1949] Holland, District Court of Rotterdam
 Annual Digest 1949 Case No. 110 314
 Temple of Preah Vihear Case [1962] ICJ Reports 6
 Texaco v. Libyan Arab Republic [1975 & 1972] 53 ILR 389
 The Tubantia [1924] 40 TLR 335
 Trail Smelter Arbitration [1941] 3 RIAA 1905
 Treasure Salvors v. Abandoned Sailing Vessel 408 E Supp. 907
 (1976)
 Tunis and Morocco Nationality Decrees Case [1923] PCIJ Ser.
 B No. 4
 Twee Gebroeders, The (1801) 3C. Rob. 336
 U.S. v. California 381 US 139 85 S.Ct. 1401 14 L.Ed. 2d. 296
 (1965)
 U.S. v. Louisiana 363 US 180 S.Ct. 961 L.Ed. 2d. 1025 (1960)
 U.S. v. Louisiana 363 US 1 (1960)
 U.S. v. Louisiana 394 US 11 (1969)
 U.S. v. Reynes 50 US (9 Howard) 127 (1849)
 U.S. v. Perchman 32 US (7 Peters) 51 (1833)
 U.S. v. Texas (1896) 162 US 1 37-42
 U.S. v. Texas Case 339 US 70770 S.Ct. 918 94 L.Ed. 1221 (1951)
 U.S.A. on behalf of P.W. Shufeldt against the Republic of Guatemala
 (1930) 24 AJIL 799
 Venezuelan Preferential Claims [1904] IX RIAA 99
 Village of Fort Erie and Buffalo and Fort Erie Public Bridge
 Co. [1927] 61 OLR 502
 Virginia v. Tennessee 148 U.S. 503 (1893) 4
 Wanderer, The [1921] VI RIAA 68
 Washington v. Oregon 211 US 127
 Western Sahara (Advisory Opinion) Case [1975] ICJ Reports 3

Williams Case (U.S. v. Venezuela) Moore, International
 Arbitrations IV 4199
 Williams v. Suffolk Insurance Co. 13 Peters 514
 Wimbledon, The [1923] PCIJ Ser. A No. 1
 Yoe Sudo, Re [1962], Japan, Supreme Court Grand Bench 53
 ILR 514

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J.K.T. Chao

I, John Kuo-Tsai Chao, hereby declare that
the thesis which follows is wholly my own
work.

ABBREVIATIONS

AJIL	<u>American Journal of International Law</u>
AJIL Suppl.	<u>American Journal of International Law Supplement</u>
Annuaire	<u>Annuaire de l'Institut de droit international</u>
Annuaire francais	<u>Annuaire francais de droit international</u>
Annual Digest	<u>Annual Digest of Public International Law Cases</u>
ASIL Proceedings	<u>Proceedings of the American Society of International Law</u>
BDIL	C. Parry (ed.), <u>A British Digest of International Law</u> (1965-)
BFSP	<u>British and Foreign State Papers</u>
BIICL	British Institute of International and Comparative Law
BILC	Parry & Hopkins (ed.), <u>British International Law Cases</u> (1964-)
BPIL	E. Lauterpacht (ed.), <u>British Practice in International Law</u>
BYIL	<u>British Yearbook of International Law</u>
Cambridge LJ	<u>Cambridge Law Journal</u>
Canadian YBIL	<u>Canadian Yearbook of International Law</u>
Cantab.	University of Cambridge
CB	American Consulate General, Hong Kong (ed.), <u>Current Background</u>
Cmd., Cmnd.	United Kingdom, Command Papers
CYILA	<u>Chinese Yearbook of International Law and Affairs</u>
Dept. of State Bulletin	United States, <u>Department of State Bulletin</u>
Doc	Document
EEZ	Exclusive Economic Zone
FAO	Food and Agricultural Organization
FAOYFS	<u>FAO's Yearbook of Fisheries Statistics</u>
FBIS	<u>Foreign Broadcast Information Service, PRC Daily Report</u>

Fed.	<u>Federal Reporter</u> (United States)
Fed.(2d)	<u>Federal Reporter</u> (United States), Second Series
FM	Foreign Ministry
FO	Foreign Office
GA	General Assembly
GAOR	General Assembly's Official Records
Hackworth	Hackworth, <u>Digest of International Law</u> , 8 vols
Hague Court Reports	Scott (ed.), <u>Hague Court Reports</u>
Harvard LR	<u>Harvard Law Review</u>
Harvard Research	<u>Research in International Law under the Auspices of the Harvard Law School</u>
H.C.Deb.	United Kingdom: <u>Parliamentary Debates (Hansard) House of Commons Official Reports</u>
H.L.Deb.	<u>House of Lords Official Reports</u>
HMSO	Her Majesty's Stationery Office
How.	Howard, <u>United States Supreme Court Reports</u> , Vols. 42-65
Hyde	Hyde, <u>International Law Chiefly as Interpreted and Applied by the United States</u> , 3 vols., 2nd ed., 1945-
IBS	<u>International Boundary Study</u>
ICJ Pleadings	International Court of Justice: Pleadings, Oral Arguments, Documents
ICJ Reports	Reports of Judgements, Advisory Opinions and Orders of the International Court of Justice
ICLO	<u>International and Comparative Law Quarterly</u>
IMCO	Intergovernmental Maritime Consultative Organisation
ICNT	Informal Composite Negotiating Text
ILA	International Law Association
ILC	International Law Commission
ILM	<u>International Legal Materials</u>
ILR	<u>International Law Reports</u> (continuation of the <u>Annual Digest</u>)

Indian JIL	<u>Indian Journal of International Law</u>
J	Journal
JDI	<u>Journal du droit international</u>
J. Maritime L. and Commerce	<u>Journal of Maritime Law and Commerce</u>
L	Law
La Fontaine	La Fontaine, <u>Pasicrisie internationale</u>
La Pradelle and Politis	<u>Recueil des arbitrages internationaux</u> , 3 vols., 2nd ed., 1957
LNTS	<u>League of Nations Treaty Series</u>
LQR	<u>Law Quarterly Review</u>
LTR	<u>Law Times Reports</u>
Modern LR	<u>Modern Law Review</u>
Moore, Arbitrations	Moore, <u>History and Digest of the International Arbitrations to which the United States has been a Party</u> , 6 vols
Moore, <u>Digest</u>	Moore, <u>Digest of International Law</u> , 8 vols
mtg	meeting
n	note
NCNC	<u>New China News Agency</u> (Weekly Bulletin, PRC)
NCU	National Chengchi University, Taipei
Netherlands ILR	<u>Netherlands International Law Review</u> (Nederlands tijdschrift voor international recht)
Netherlands YIL	<u>Netherlands Yearbook of International Law</u>
OAU	Organization of African Unity
ODIL	<u>Ocean Development and International Law</u>
PRC	People's Republic of China
Pub. PCIJ (A/B)	Publications of the Permanent Court of International Justice, Series A/B: Collection of Judgements, Orders, and Advisory Opinions, Nos. 1-50 (Leyden, 1922-1932). The original Series A and Series B are now combined and re-numbered.
Pub. PCIJ (C)	Publications of the Permanent Court of International Justice, Series C: Acts and Documents Relating to Judgments and Advisory Opinions Given by the Court, Nos. 1-58 (Leyden, 1922-1932)

Pub. PCIJ (D)	Publications of the Permanent Court of International Justice, Series D: Statutes and Rules, etc., Nos. 1-6 (Leyden, 1922-1932)
Pub. PCIJ (E)	Publications of the Permanent Court of International Justice, Series E: Annual Report, Nos. 1-8 (Leyden, 1925-1932)
Pub. PCIJ (F)	Publications of the Permanent Court of International Justice, Series F: Index, Nos. 1-2 (Leyden, 1927, 1932)
Q	Quarterly
R	Review; or Republic
· RDI (La Pradelle)	<u>Revue de droit international</u> (Paris, ed. by La Pradelle)
RDILC	<u>Revue de droit international et de législation comparee</u> (Brussels)
Recueil des Cours	<u>Recueil des cours de l'Académie de droit international</u>
RGDIP	<u>Revue générale de droit international public</u> (Paris)
RIAA	United Nations, <u>Reports of International Arbitral Awards</u>
RIIA	Royal Institute of International Affairs
Rob. Ecc.	<u>Robertson's English Ecclesiastical Reports</u> , 2 vols
ROC	Republic of China
SCP	<u>Survey of People's Republic of China Press</u>
SI	Statutory Instrument (United Kingdom)
Sup. Ct.	<u>Supreme Court Reporter, National Reporter System</u>
Suppl.	Supplement
UK	United Kingdom
UKTS	<u>United Kingdom Treaty Series</u>
UN	United Nations
UNCLOS	United Nations Conference on the Law of the Sea
UNESCO	United Nations Educational, Scientific and Cultural Organisation
UNLS	United Nations Legislative Series
UNTS	<u>United Nations Treaty Series</u>
US	United States; or <u>United States Supreme Court Report</u>

USFA	United States Foreign Relations
U.S. Treaties	<u>Treaties, Conventions, International Acts, Protocols, and Agreements between the United States of America and Other Powers</u> , vol. 3, 1910-1923 (Washington, D.C., 1923)
Wall	Wallace, <u>United States Supreme Court Reports</u> , vols. 68-90.
Wheat	Wheaton, <u>United States Supreme Court Reports</u> , vols. 14-25
Whiteman	Whiteman, <u>Digest of International Law</u> (1963-)
WMO	World Metrological Organizations
World Court Reports	Hudson, <u>World Court Reports</u> , 4 vols. (1934-43)
YBILC	United Nations, <u>Yearbook of the International Law Commission</u>
Zaö RV	<u>Zeitschrift für ausländisches öffentliches Recht und Völkerrecht</u>

INTRODUCTION

In the China Seas, there are two territorial disputes that have obstructed the development of exploration and exploitation of natural resources in the region. One of these is the Tiao Yu Tai (Senkaku) Islands dispute in the East China Sea, between China (ROC and PRC) and Japan. The other is the Nansha (Spratly) and Hsisha (Paracel) Islands dispute in the South China Sea, contested by China (ROC and PRC), Vietnam and the Philippines. Both cases concern sovereignty over these offshore islands, which is of great importance in determining their effect on the continental shelf boundaries.

Some monographs have been produced in connection with the China Sea island disputes, but few authors deal with the fundamental concepts of the boundaries problem in relation to the delimitation of the China Seas' continental shelf boundaries. Most writers on this topic either exhibit a lack of historical knowledge, documentation and information, as well as of expertise in the Chinese language and affairs, or they reveal a lack of legal synthesis. The topic is generally regarded by most international lawyers with a mixture of apprehension and fascination in approximately equal proportions. Apprehension, because the lex lata and lex ferenda are complex, and the fact that the documentation is mainly in the Chinese language obscures the topic and makes it something of a dangerous minefield for non-specialist. Fascination, because intellectually the problems raised by the progressive development of the law of sea, especially in relation to sea boundaries, are perhaps more stimulating than those raised by any other branch of law at the present time.

The primary aim of this dissertation is to provide a reliable survey of all aspects of the boundary problems concerning the

delimitation of the continental shelves of the Tiao Yu Tai, Nansha and Hsisha Islands in the East and South China Seas. The work is divided into four parts. Part One, entitled "Land Boundaries and Title to Territory", deals with legal relations between state and territory, an understanding of which is essential to an analysis of the territorial and seabed delimitation dispute concerning the above-mentioned islands. Part Two, entitled "Delimitation of Submarine Boundaries", traces in detail the development of the continental shelf doctrine, in particular, the difficult questions arising in respect of small islands. Part Three, entitled "Boundary Problems concerning the Tiao Yu Tai, Nansha and Hsisha Islands" brings the two preceding parts together, exploring and analysing the complex problems posed by the Tiao Yu Tai, Nansha and Hsisha Islands in the East and South China Seas. The controversy surrounding the legal status of these islands, as well as the rules governing the delimitation of their continental shelf boundaries, are examined and assessed. Part Four concludes with a number of recommended solutions to these disputes.

VOLUME ONE

PART I

LAND BOUNDARIES AND TITLE TO TERRITORY

CHAPTER 1

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CHAPTER I

LEGAL NATURE OF INTERNATIONAL BOUNDARIES

1. Introduction

The main legal function of the boundaries of a state is the delimitation of the area in which that state possesses the right to exercise jurisdiction to the exclusion of any other state. A preliminary examination of territorial boundary problems in general illuminates the underlying causes of the problems of delimitation which have led, and will continue to lead, to conflicts between states over disputed claims. Such a study also helps to explain the distinction between sovereignty and sovereign rights which are an essential feature of the continental shelf doctrine. Since this doctrine is based on the natural prolongation of land territory into and under the sea, the rules for its delimitation are therefore related in principle to the customary rules for the delimitation of land territories.

Moreover, disputes concerning delimitation of the continental shelf of the Tiao Yu Tai and Nansha Islands in the East and South China Seas, to which this dissertation is directed, are as much a dispute over ownership of the land territory of the islands concerned as over the legal rules for submarine boundary delimitation in the presence of these small islands.

2.

International law does provide - largely thanks to a series of decisions by judicial and arbitral tribunals - certain guidelines regarding the principles upon which the rules concerning the delimitation of boundaries, whether territorial or submarine boundaries, are based. This Chapter, therefore, investigates the basic principles upon which delimitation of boundaries have been based from time immemorial to the present day.

A passage which puts the international law of boundaries in a nutshell can be found in the judgment of Max Huber, the arbitrator in the Island of Palmas Arbitration, which concerned the right to sovereignty over an island in the Pacific between the archipelagoes of the Philippines and the Netherlands East Indies:

Sovereignty in the relations between States signifies independence ... Territorial sovereignty is, in general, a situation recognised and delimited in space, either by so-called natural frontiers as recognised by international law or by outward signs of delimitation that are undisputed, or else by legal engagements entered into between interested neighbours, such as frontier conventions, or by acts of₁ recognition of States within fixed boundaries

If, however, no conventional line of sufficient topographical precision exists or if there are gaps in the frontiers otherwise established, or if a conventional line leaves room for doubt ... the actual, continuous and peaceful display of State functions is in case of dispute the₂ sound and natural criterion of territorial sovereignty.

1. [1928] II RIAA, p.838.
2. Ibid., p.840.

3.

This passage puts the international law of land boundaries in a nutshell. The definition of sovereignty per Huber seems to fall into five component parts as follows:

- (1) Natural frontiers as recognised by international law;
- (2) Signs of outward delimitation which must be:
 - (a) Outward
 - (b) Undisputed
- (3) Treaties or agreements;
- (4) Display of state functions, which must be:
 - (a) Actual
 - (b) Continuous
 - (c) Peaceful
- (5) Recognition of states with fixed boundaries.

This Chapter may be regarded as an extended commentary upon them.

In this Chapter we shall first of all attempt to analyse the terminology of territory, title to territory and territorial sovereignty, and then with the help of some new evidence go on to consider the legal nature of international boundaries. The lawyer will normally regard the legal character of international boundaries as that of delimiting spatially the territorial sovereignty of states.

Boundaries, even under a strictly legal analysis, serve a variety of functions, confer differing legal rights, and impose differing legal obligations. This raises special

problems for the delimitation of land territory, where the diversity of legal bases and boundary functions is most manifest. There is, however, a substantially greater homogeneity in maritime and submarine boundary functions as well as in air space.

The second vexed issue in writing on international boundaries, is that of terminology. Boundary refers to a line, while frontier refers to a long narrow zone or region which fronts or faces another state. It is legally significant to draw the distinction between "frontiers" and "boundaries" which mark either the de facto or de jure limits of political sovereignty, or the extension of land territory under the sea.

The third issue to be discussed is the chronology of the establishment of a boundary from allocation to delimitation, demarcation and administration. Allocation refers to the initial political division of territory. Delimitation means the selection of a boundary site and its definition. Demarcation means the construction of the boundary in the landscape. Administration is the exercise of jurisdiction and in effect governs the territory. These categories afford both a useful terminology and a convenient classification into which legal issues relating to territory and boundaries may be fitted. The chronological stages of allocation, delimitation, demarcation and administration may overlap in time, be separated, perhaps widely, in time, or indeed one stage or another may never occur or never be completed. As

the international boundary passes through the stages of allocation, delimitation and demarcation, its definition may become increasingly precise and the location of the boundary may alter.

The fourth issue to arise is the classification of boundaries. State boundaries are generally marked by special signs, but this is not necessarily true in all cases and is unlikely to occur in the case of seabed boundaries. Boundaries may be described as 'natural' or 'artificial'; it is possible to classify them in many ways. Although all the types of boundary recognised as international boundaries have been subjected to various classifications, such as 'morphological', 'phenomenological' and 'genetic', the legal classification of international boundaries has never been undertaken. As we shall see, writers on boundaries tend to define and classify 'boundaries' and 'frontiers' using 'scientific', 'organic' or 'military' criteria, but most of them have little knowledge of law. An attempt at a legal classification of 'boundaries' and 'frontiers' is therefore made in order to categorise boundaries by (a) the right reserved to states within them, and (b) the obligation imposed upon states to respect them.

2. Terminology:

2.1 Territory

The idea of the state implies a relation to territory, or rather the ownership of a certain quantity of territory.³

3. Sheldon Amos, Lectures on International Law (London: Stevens & Sons, 1876), p.34.

One of the essentials of sovereign statehood, as understood by the orthodox international lawyer, is jurisdictional supremacy over some reasonably identified territory.⁴

Territory is not only essential to the existence of the modern state, but its acquisition and loss, the extension and contraction of state frontiers, are traditionally the primary indicia of national power and prestige. For instance, China still officially seeks the return of about 7,000 square miles of Siberian border territory from the Soviet Union.⁵

The word 'territory', is the English form of the Latin Territorium, originally meaning the land lying round the ancient city-state, devoted to agriculture and the pasturing of stock. Today its denotation has extended to the area subject to the powers of government exercised by the modern

4. The jurisdiction of the nation within its own territory is necessarily exclusive and absolute: Schooner Exchange v. McFaddon (1812) 7 Cranch 116; 136; Church v. Hubbard 2 Cranch 187; 234. See also J.B. Moore, A Digest of International Law, Vol. 11 (Washington: Government Printing Office, 1906), p.4.
5. It was admitted by Lenin and Trotsky that more than 600,000 square miles of Siberia were seized from China by Tsarist Russia under 'unequal treaties'. For details, see Horst Pommerening, Der Chinesisch-Sowjetische Grenzkonflikt: Das Erbe der Ungleichen Verträge, (Olten und Freiburg im Breisgau: Walter-Verlag AG, 1968); George Ginsburgs and Carl Pinketele 'The Genesis of the Territorial Issue in the Sino-Soviet Dialogue: Substantive Dispute or Ideological Pas de Deux?', in J.A. Cohen (ed) China's Practice of International Law: Some Case Studies, (Harvard U.P., 1972), p.167. On February 24th 1982 the Soviet Government have proposed a resumption of talks with China on their border dispute. The Scotsman, 24 February, 1982, pp. 3, 8.

state. At the same time, by a peculiar inversion due to the draftsmen of the American Constitution and their imitators, the term is applied to areas outside political divisions which are not completely organised. So that, in this sense, a 'Territory' is something which is not a state. But, whatever the origin or the ambiguities of the term a territory must of necessity have limits or boundaries, be large or small, a world empire or a town allotment.⁶

In law, territory is a much wider conception than that of mere land. It means any area of the earth's surface (including all land, sea and submarine areas and air space) which is subject to sovereign rights and interests. 'It is the land which confers upon the coastal state a right to the waters off its coast'.⁷ The rights and interests which a state has in respect of the sea-bed of the internal waters and territorial seas is under the legal regime of territorial sovereignty. The state's authority over the mineral resources of its land territory and territorial sea is thus based on the concept of territorial sovereignty as an essential part of its legal personality; its sovereign rights over the mineral resources in the soil and subsoil of its continental shelf,

6. F.W.S. Cumbrae-Stewart, The Boundaries of Queensland, (Brisbane: Government Printer, Anthony James Cumming, 1930), pp. 3-4.

7. Anglo-Norwegian Fisheries Case, ICJ Reports, 1951, p.133. See below, 3.2.

are however derived from the geographical concept of natural prolongation.⁸ The rights and interests which a state has with regard to the high seas and the exclusive economic zone, amount to less than sovereignty and do not make these maritime areas territory in law. Similarly, air space is the subject of sovereignty, but apparently not outer space, so that different sets of rights and duties apply to a commercial aircraft in flight around the world from those which apply to a satellite.

The possession of territory is essential to the conception of the modern state,⁹ and, within its territory, the modern state has absolute jurisdiction and express rights of extra-territoriality, based upon treaty or capitulation.¹⁰

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8. See e.g., the North Sea Continental Shelf Cases, ICJ Reports, 1969, p.31. In the U.K.-French Continental Shelf Arbitration (First Decision), France contended that the geographical and geological considerations which it has invoked establish the existence of natural links between the continental land mass of France and the whole Channel Islands region, including the submarine areas of these islands. Its legal position is justified by the basic factors underlying the notion of natural prolongation. 54 ILR (1979), pp. 89-90. See below, Chs. 5, 6 and 7.
 9. Without territory a legal person cannot be a state. Art. 1 of the Montevideo Convention of 1933 states the basic criteria for statehood: "The State as a person of international law should possess, inter alia, a defined territory". See 165 LNTS (1936), No. 3028, p.25.
 10. See e.g., Arts. XVI, XXI, XXIV, XXV, XXVI, XXVII, XXVIII and XXIX of the Treaty of Wanghia, 1844; Arts. X, XXIII, XXV, XXVI, XXVII, XXVIII, XXIX and XXXI of the Treaty of Whampoa, 1844. See G.W. Keeton, The Development of Extraterritoriality in China, Vol. II (London: Longmans, Green & Co., 1928), pp. 277-85.

The extent of the territory is determined by historical events. It has very considerable influence on the political character and importance of the state, and it is closely connected with several important legal and international questions. These in many cases turn upon questions of boundaries.¹¹

To sum up, we now have a reasonably clear idea of the legal concept of territory and of the nature of its relationship to the state. First, a state fully sovereign has complete authority over its territory.¹² Territory is an essential element of the state: it is one of the triad of factors - 'territory', 'population' and 'government' - generally recognised as the major components of any modern state.¹³ Secondly, the territory of a state may fairly be regarded as its 'international property', as analogous to land owned by

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11. See e.g., The Delimitation of the Polish-Czechoslovakian Frontier (Question of Jaworzina) (Advisory Opinion) Case, PCIJ Series B, No. 8; the Delimitation of the Serbo-Albanian Frontier (Question of the Monastery of Saint-Naoum) Case, PCIJ Series B, No. 9; the Frontier between Turkey and Iraq (Mosul Boundary) Case, PCIJ Series B, No. 12; Legal Status of Eastern Greenland Case, PCIJ Series A/B, No. 53; Minquiers and Ecrehos Case, ICJ Reports, 1953, p.47; Certain Frontier Land Case, ICJ Reports, 1959, p.209; Temple of Preah Vihear Case, ICJ Reports, 1962, p.6; Rann of Kutch Arbitration, 50 ILR (1976) p.2; Beagle Channel Arbitration, 52 *ibid.*, (1979) p.93. See below, Chs. 2, 3 and 4.
12. Quicquid est in territorio, est etiam de territorio, and qui in territorio meo est, etiam meus subditus est.
13. Art. 1 of the 1933 Montevideo Convention, 165 LNTS (1936), No. 3802, p.21. Cf. C.R. Crawford, "The Criteria for Statehood in International Law", 48 BYIL (1976-77), p.93; *idem*, The Creation of States in International Law, p.36.

an individual under municipal law. Thirdly, the territory of a state may be regarded as the primary sphere within which it exercises its governmental powers or 'jurisdiction'. Fourthly, territory may be considered not in relationship to the state, but rather in its relationship to its population. It may be seen as the 'property' of its inhabitants and, dynamically, as the basis for the exercise of 'self-determination' and the establishment of new states.

2.2 Title to Territory

In the Island of Palmas Arbitration, Max Huber made the following remarks:

Titles of acquisitions of territorial sovereignty in ... international law are either based on an act of effective apprehension, such as occupation or conquest, or, like cession, presuppose that the ceding and the cessionary Powers or at least one of them, have the faculty of effectively disposing of the ceded territory.¹⁴

It is self-evident that in principle title to territory falls into the sphere of international law when supplying both broad principles and detailed rules for the delimitation of territorial sovereignty. Historically one of the oldest, and still the most persistently attractive approaches is to treat territory as the 'international property' of the state; territorial sovereignty is then regarded as analogous to a private law right of property. Borrowing the terminology of municipal

14. II RIAA, p.839. Title by conquest resolves itself juridically into title by cession. It should be noted that 'conquest' may not per se, under contemporary international law, act as a lawful mode of acquiring state territory.

property law, a state whose sovereignty over territory is questioned must show 'title' to that territory.

The term 'title' in municipal property law covers the reasons whereby the owner of lands has the just possession of his property, titulus est justa causa possidendi id quod nostrum est.¹⁵ Generally, 'title' means a right to property considered with reference either to the manner in which it has been acquired, or to its capacity of being effectively transferred.

'Title' is, however, an equivocal term. It is commonly used to describe both the facts recognised in law as conferring a right and, elliptically, as the right itself. In a developed legal system in which the range of facts which are - and, equally important, the facts which are not - recognised as creating a legal right are reasonably well-defined, the ambiguity is of little importance. In international law the case is different. A claimant to territory may call to his aid a wide range of facts allegedly constitutive of a legal right of sovereignty: the exercise of governmental functions in the territory, either peacefully or in consequence of military force;¹⁶ geographical factors such as the nearness of

15. Co. Litt. 3456.

16. In the Eastern Greenland Case, the court observed that 'in many cases the tribunal has been satisfied with very little in the way of actual exercise of sovereign rights, provided that the other State could not make out a superior claim'. PCIJ Series A/B, No. 53, p.46. Cf. the Clipperton Island Arbitration, II RIAA, p.1107; the Island of Palmas Arbitration, ibid., p.829; the Minquiers and Ecrehos Case, ICJ Reports, 1953, p.4; Argentine-Chile Frontier Case, XVI RIAA, p.109. In the Island of Aves Arbitration (the Netherlands-Venezuela) (1857), the Arbitrator/

the disputed territory to, or its 'continuity' with, territory over which the claimant is the undisputed sovereign;¹⁷ social considerations such as the exploitation of the region by nationals of the claimant state, or evidence of the wishes of the inhabitants.¹⁸ Military security may be invoked as a ground for placing territory under the control of one claimant, rather than a foreign and potentially unfriendly power.¹⁹

Arbitrator held that as the government of the Netherlands did nothing except utilize the fishing on such island through its subjects, while the government of Venezuela had been the first to hold an armed force there and to exercise acts of sovereignty, it thus confirmed the dominion which it had acquired through a general title derived from Spain. Recueil des arbitrages internationaux, by A. de la Pradelle and N. Politis, 2nd ed. Vol. II (Paris: Les Edition Internationales, 1957), p.412.

17. See e.g., the Bulama Island Arbitration (Great Britain-Portugal) (1870), Recueil des arbitrages internationaux, Vol. II, p.604; Island of Palmas Arbitration, II RIAA, pp. 854-55, 870; The Anna (1805) 5 C. Rob. 373; Secretary of State for India v. Sri Raja Chelikani Ramo Rao (1916), 32 TLR, 652; North Sea Continental Shelf Cases, ICJ Reports 1969, p.31. See below, Ch. 7.
18. An early example of the application of interests of the local population is to be found in Art. 3, Vienna Treaty between Nassaux and Prussia of 1815. See A.M. Stuyt, Survey of International Arbitrations 1794-1970 (Leyden: A.W. Sijthoff, 1972), No. 17, p.20. See also the London Protocol between Great Britain and Russia for the delimitation of the Afghan frontier of 1885, ibid., No. 140, p.145. In the Anglo-Norwegian Fisheries Case, the Court found it possible to take account of geographical and socio-economic considerations in its judgment. ICJ Reports, 1951, p.116. Cf. Art. 4 of the Geneva Convention on the Territorial Sea and the Contiguous Zone, 1958. See below, Ch. 7.
19. The Suez Canal and the Panama Canal are the obvious examples. See 2b BDIL, Sec. III, p.191.

History in the form of traditional links - discovery by nationals of the claimant's, commercial, political and social contacts - between the disputed territory and a claimant state may be relied on.²⁰ The attitudes of foreign governments in 'recognising' formally or tacitly 'acquiescing' in claims of sovereignty may be pleaded, together with legal transactions affecting the territory, such as treaties purporting to transfer sovereignty over a disputed territory, or implying by reference the sovereignty of the claimant.²¹

There is, however, room for considerable and legitimate doubt as to which of these facts are recognised as vesting 'title' to territory, or at least a legal presumption in favour of a claimant, and which may at most have influence as elements in a sort of 'equity' which may be called in aid in appropriate circumstances, but which could not oust an established legal title.²² There is, indeed, a substantial body of judicial and academic opinion which, drawing on the analogies provided by

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20. See e.g., Minquiers and Ecrehos Case, ICJ Reports, 1953, p.47; Case Concerning Over Certain Frontier Land, ICJ Reports, 1959, p.209; Temple of Preah Vihear Case, ICJ Reports, 1962, p.6. See below, Chs. 2,3,4.
 21. Cf. Frontier between Turkey and Iraq (The Mosul Boundary) Case, PCIJ Series B, No. 12; Temple of Preah Vihear Case, ICJ Reports, 1962, p.6. See below, Chs. 2,3,4.
 22. See e.g., Anglo-Norwegian Fisheries Case, ICJ Reports, 1969, p.3; Anglo-French Continental Shelf Arbitration, 54 ILR (1979), p.6. See below, Chs. 2 and 7.

municipal private law, favours 'possession' as the primary determinant of territorial sovereignty. The claimant whose sovereignty is disputed must show 'effective, uninterrupted, and permanent possession' effected in the name of the state. Title to territory, like the Roman law counterparts, requires the presence of corpus as well as animus. It is founded upon two elements: 'the intention and will to act as sovereign, and some actual exercise or display of such authority'.²³

There is, however, a divergence of opinion as to whether or not effective control of territory is essential only to the initial acquisition of title, or is essential also to its maintenance. In principle, property law analogies suggest that title to territory may be lost by abandonment or derelictio,²⁴ but international tribunals have been slow to admit a loss of sovereignty due to failure to exercise governmental functions so long as there is evidence of an unimpaired 'intention and will' to retain sovereignty. Likewise, it is maintained in theory that the concepts of extinctive and acquisitive prescription may operate to divest a state of sovereignty once acquired or to vest title in a state exercising governmental

23. Eastern Greenland Case, PCIJ Series A/B, No. 53, pp. 45-6. See below, Ch. 2.

24. A thing which is thrown away is understood by the act to be abandoned. Abandonment is defined as a voluntary relinquishment of a known right with no intention to reclaim. Menzel v. Liszt 49 Misc. 2d. 300, 267, N.Y.S. 2d. 804 (Sup. Ct. 1966). See below, Ch. 4.

functions in territory adverse to the original sovereign.²⁵ Again, however, the practice of international judicial tribunals provides no unambiguous support for the application of these principles. Traditionally, international law has also accepted armed force as a legitimate means of transferring sovereignty over territory. 'Subjugation' - the conquest of the entire territory of a state, involving the extinction of the personality of the state and the transfer of sovereignty to the victor - has traditionally been regarded as a good 'title' to territory,²⁶ and so, similarly, has the retention of territory after the close of hostilities either with, or, after the passage of a significant period of time, without a formal cession of territory by treaty. Conversely, there is doubt as to whether a treaty purporting to transfer sovereignty over territory operates to vest title ipso jure, or whether control over the territory must first be effectively asserted. The scope of the concept of 'possession' of territory, and the

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25. In the British Guiana Boundary Arbitration (1897) 21 Hertslets Commercial Treaties, p.1123, the parties agreed that 'adverse holding or prescriptions during a period of fifty years shall make good title'. See below, Ch. 3.
26. "Subjugation" involves the extinction of the personality of the state and transfers of sovereignty to the victor. See generally, Alphonse Rivier, Principes du Droit des Gens, Tome III (Paris: Librairie Nouvelle de droit et de Jurisprudence, 1896), p.436; R.Y. Jennings, "Government in Commission", 23 BYIL (1946), pp. 140-41; L. Oppenheim, International Law, Vol. 2, 7th ed. Edited by H. Lauterpacht (London: Longmans, Green & Co., 1952), p.600; Morris Greenspan, The Modern Law of Land Warfare (Univ. of California Press; Berkeley & Los Angeles, 1959), p.601.

existence or not of something akin to an abstract right of property or 'ownership' in international law is thus a matter for dispute.

There are, however, other schools of thought that reject the application of private law analogies in the law of territory.²⁷ On one view, territory is no more than the primary sphere of activity of the state, the space within which it exercises legislative, executive and judicial functions. State territory is then the exclusive sphere of validity of the national legal order. In effect, this view equates territorial sovereignty to 'territorial jurisdiction': sovereignty is acquired and lost with the expansion and contraction of jurisdiction. At any given moment, the criterion for determining the limits of state territory is the 'principle of effectiveness', for it is the effective exercise of governmental functions which constitutes 'title' to territory.²⁸

Very different notions of territorial sovereignty have been associated with nineteenth and twentieth century nationalist movements and democratic political theory. For those desiring to change an existing territorial situation, the concept of

27. Cf. H. Lauterpacht, Private Law Sources and Analogies of International Law (Archon Bks, 1970), pp. 91 et seq.

28. See e.g., the Guiana Boundary Arbitration [1904] XI RIAA, p.11; Island of Palmas Arbitration [1928] II RIAA, p. 838; Clipperton Island Arbitration [1931] ibid., p.1104; Eastern Greenland Case, [1933] PCIJ Ser. A/B, No. 53; Minquiers and Ecrehos Case, ICJ Reports, 1953, p.47; Western Sahara (Advisory Opinion) Case, ICJ Reports, 1975, p.3. See below, Chs. 2, 3.

territorial sovereignty as associated solely with the rights of the existing political sovereign is naturally an anathema.

The fundamental territorial relationship must rather be regarded as the nexus between the land and its inhabitants.²⁹

In one form this provides no more than a legal basis for self-determination:³⁰ territorial sovereignty is vested not in the state but in the 'people', who have an inherent 'natural' or 'human' right to modify existing demarcations of territorial

29. A permanent population is necessary for statehood, though, as in the case of territory, no minimum limit is apparently prescribed. This does not, of course, mean that all the territory of the state must be inhabited; in particular uninhabited offshore islands can be included in state territory. Cf. Art 1 of the Montevideo Convention of 1933, 165 LNTS (1936), No. 3802, p.21; Crawford, op. cit., pp. 85 et seq. Art. 4 of the 1920 Arbitration Convention between Estonia and Latvia states: 'In arriving at their decision [on the boundary question] the Commission will take into account ethnographical and historical principles ... and the interests of the local population'. 2 LNTS (1920), No. 66, p.188.

30. For example, on 12 February 1953 the United Kingdom and Egypt signed an agreement concerning 'Self-Government and Self-Determination for the Sudan'. Cmd. 8904 (London: HMSO, July 1953); the French people by a referendum on 8 January 1961 recognised the right of the Algerians to choose their political destiny in relation to the French Republic. Evian Agreements for independence of Algeria, 18 March 1962, 1 ILM (1962), p.214; in 1975 the UN General Assembly reaffirmed the inalienable right to self-determination of the population of the Spanish Sahara. A/Res. 3292 (XXIX), adopted on 13 December 1974, XII No. 1 UN Chronicle (January 1975), pp. 58-59, XII No. 10 ibid., (1975), pp. 5-10. A/Res. 3458 (XXX), XIII No. 1 ibid., (1976), pp. 91-92. Cf. A/Res. 1514 (XV), 14 December 1960, the Declaration on the Granting of Independence to Colonial Countries and Peoples. Cf. Western Sahara (Advisory Opinion) Case, ICJ Reports, 1975, p.3. For details, see A. Rigo Sureda, The Evolution of the Right of Self-Determination (Leiden: A.W. Sijthoff, 1973).

sovereignty, even to the extent of establishing a new state. 'Title' to territory is the will of the population. In another form, this concept developed into a dubious biological mysticism. The bond between territory and population is organic. The nation state, once established, could be regarded as a sort of biological organism, subject to quasi-biological laws of growth and decay.³¹ This view is inherently expansionist; dismemberment of a state established on ethnic principles is viewed with the horror of vivisection. This political concept is one of dangerous vagueness as encouraging inordinate imperialist claims, and its application has led to some disastrous results.

Another school of thought would make title to territory primarily dependent upon recognition or acquiescence by the international community as a whole. In part, this stems from no more than a desire for an organisation of the existing decentralised procedures for territorial change. It has, however, roots in the fact that recognition and acquiescence do serve as procedures for resolving certain territorial problems.³² Externally, sovereignty over territory has two

31. The concept of the state as a living organism facilitates the expansion of its frontiers. It is called the 'biological' or 'organic' school of political geography. See F. Ratzel, Politische Geographie, 3rd ed. by E. Oberhummer (Munich, Berlin and Leipzig, 1897). See below, 4.2.3.
32. Cf. Eastern Greenland Case, PCIJ Series A/B, No. 53. See below, Ch. 2.

main aspects: on the one hand, it involves the exclusion of the authority of all states other than the territorial sovereign;³³ it provides a basis for entry into relations on the basis of sovereign equality with other states. Recognition of territorial sovereignty, express or tacit, serves at the least as an indication that title will not be disputed; it precludes the recognising state from subsequently contesting the title. At most it may be argued that, not only is the external exercise of sovereignty dependent upon recognition, but that recognition also constitutes title to the territory in respect of which sovereignty is recognised.³⁵

33. Judge Huber held in the Island of Palmas Arbitration that 'territorial sovereignty ... involves the exclusive right to display the activities of a State'. 'Conversely, the right to be a state is dependent at least in the first instance upon the exercise of full governmental powers with respect to some area of territory'. II RIAA, p.839. See below, 2.3.
34. A state becomes an international person when it possesses the three essential elements: population, territory and a government which holds the power in the territory of this population. Art. 1 of the 1933 Montevideo Convention states the basic criteria for statehood: 'The State as a person of international law should possess, Inter alia, a defined territory'. 165 LNTS (1936), No. 3802, p.21. Cf. Crawford, op. cit., 48 BYIL (1976-77), p.93; idem, The Creation of States in International Law, p.36.
35. The external sovereignty of any state may require recognition by other states in order to render it perfect and complete. See Wheaton's Elements of International Law, 6th English ed., Rev. by A.B. Keith, Vol. 1 (London: Stevens & Sons, 1929), pp. 45-46; Crawford, The Creation of States in International Law, pp. 36-40. See below, Ch. 4.

In practice we shall find when we come to look more closely at the basis of title to territory that none of these is completely satisfactory. Each concentrates on one of the complex elements in the relationship between state, territory, population and the international community, to the neglect of others. Each fails to take account of the possibility that territorial titles may rest upon not merely multiple, but also on a single factor.

2.3 Territorial Sovereignty

State territory, of which, we must remember, the continental shelf is the natural submarine prolongation, is the entire amount of land within the boundaries of each state. The territory of the state comprises those parts of the earth's surface which are subject to its sovereignty, whereas the continental shelf has been deemed by treaty and custom to be subject only to sovereign rights. 'Sovereignty' is a word much used and abused, but its most important connotations are clear enough. It signifies an 'absolute and perpetual power'³⁶

36. 'Sovereignty is that absolute and perpetual power of a public which in Latin is termed majestas ...' see De J. Bodin Angeuin, Les Six Livres de la Republique, (Paris : Chez Jacques du Puys, 1576), L.I. IX, p.125. Bodin used the word souverainete as well as old terms like majestas and summa potestas. He considers the summa potestas bound by the laws of God and of nature. There is little dispute that the meaning of sovereignty in constitution law is equivalent to suprema potestas, the highest legal order, power or authority. Just as Bodin had said that the sovereign power must belong exclusively to the Ruler, so Althusius, the German Calvinist insisted that this majestas must belong exclusively to the People. See F.H. Hinsley, Sovereignty (London: C.A. Watt & Co., 1966), pp. 132-33. Sovereignty, since Bodin defined it as a supreme power has become the mark of a true state.

or 'authority': 'absolute', in the sense that it is independent of any superior authority other than law - 'Sovereignty in the relation between states signifies independence':³⁷ 'perpetual' in the sense that it is indefinite or permanent in duration. 'Power' or 'authority' exercised by a state or any other entity which falls short of these requirements is, by definition, not 'sovereignty' but rather 'jurisdiction' or 'control', limited in duration or to purpose. Sovereignty in respect of individuals is termed 'personal sovereignty', and in respect of territory 'territorial sovereignty'. The similarity in terminology, however, disguises significant differences between the two concepts. Personal sovereignty involves the power or authority of the state to make and to enforce laws to govern the conduct of individuals. It implies reciprocal rights and duties; its counterpart is the bond of 'allegiance', temporary or permanent, which links the individual to a given state. In general, it is municipal law which determines, on the basis of criteria such as citizenship, nationality and presence within state territory, the bond of personal

37. Island of Palmas Arbitration, II RIAA, p.838.

sovereignty or allegiance.³⁸ International law leaves states, in this respect, a wide measure of discretion, possibly limited by broad general principles, certainly limited by explicit obligations undertaken towards other states. The implications of the relationship of personal sovereignty are of great importance for municipal law, but rarely of any concern to international law.

Territorial sovereignty, on the other hand, is of relatively little significance in municipal law. Territory may, for example, be under the 'sovereignty' of a state, but yet not within the sphere of application of its municipal law. This will be the case if, say, an area such as the territorial sea or air space is deemed in international law to be under the sovereignty of a state which has made no provision for the application of its laws to that area. Similarly, annexed or ceded territory will not normally automatically be subject to the municipal law of the new

38. The common-law doctrine of allegiance to the Crown is to be found in Calvin Case (1608), 77 E.R. 377; H. Lauterpacht, 'Allegiance, Diplomatic Protection, etc., over Aliens', 9 Cambridge LJ (1947), p.330; Clive Parry, British Nationality (London: Stevens & Sons, 1951), pp. 7-8; idem, Nationality and Citizenship Laws of the Commonwealth and of the Republic of Ireland (London: Stevens & Sons, 1957), Ch. 2, p.28; J. Mervyn Jones, British Nationality Law (Oxford: Clarendon Press, 1956), pp. 1, 3, 51-57. The advisory opinion of the ICJ on the Western Sahara shows, legal ties of territorial sovereignty over people or land must be distinguished from ties of allegiance, in the case of persons, and from mere customary rights in relation to land, ICJ Reports, 1975, p.12.

sovereign. Conversely, the fact that a given state legislates and enforces its laws in respect of persons within a certain territory does not necessarily imply its territorial sovereignty. For a state may perform acts of sovereignty in respect of its nationals wherever they may be, providing it does not infringe the territorial sovereignty of any other state.³⁹ A state may perform all the normal functions of government in territory over which its sovereignty is excluded: territory 'leased' by treaty, for example, or territory administered under mandate or trust.

Territorial sovereignty is, in general, a situation recognised and delimited in space.⁴⁰ It is of paramount importance for international law.⁴¹ The delimitation of

39. Cf. Anglo-Norwegian Fisheries Case, ICJ Reports, 1951 p.116; Fisheries Jurisdiction (U.K.-Iceland) (Merits) Case, ICJ Reports, 1974, p.3.

40. Cf. Island of Palmas Arbitration, II RIAA, p.838. Max Huber adds that 'territorial sovereignty ... involves the exclusive right to display the activities of a state. This right has as corollary a duty: the obligation to protect within the territory the rights of other states, in particular their rights to integrity and inviolability in peace and in war, together with the rights which each state may claim for its nationals in foreign territory', ibid., p.839. See above,

41. Suontausta asserts that the primacy of international law is established on a basis of territorial loyalties. See Tauno Suontausta, La Souverainete des Etats (Helsinki, 1955)

territorial sovereignty is always a matter of international concern. It always has 'an international aspect', the more so as the territorial claims of each state match with, and may conflict with, the claims of its neighbours, or with the interests of the international community as a whole.⁴² Nevertheless, in the normal case, in which the territory of the state is not the subject of international dispute, we look to the internal public law of the state for a definition of its territory and not to international law. Normally, municipal law will describe the territory of the state for the purposes of government and the jurisdiction of the courts. A few states include in their constitutional instruments detailed descriptions of the boundaries of national territory.⁴³ More usually, the limits of national claims must be adduced from a variety of sources: municipal legislation, international agreements, maps, governmental practice and unilateral declarations claiming sovereignty over territory. In case of doubt, a formal statement by the executive is usually conclusive for a municipal court.

42. Great importance is attached to the principle stated by the Court in the Anglo-Norwegian Fisheries Case that: 'the delimitation of sea areas has always an international aspect; it cannot be dependent merely upon the will of the coastal state as expressed in its municipal law'. ICJ Reports, 1951, p.132. Valuable as this statement of the principle is, it leaves a lot of questions unanswered, for merely to say there is an 'international aspect' does not take the matter very far. Cf. The S.S. Lotus, PCIJ Series A, No. 9, p.10. See below, 3.2.

43. See, e.g., Art. 1 of the Constitution of the Republic of the Philippines of 1971. See below, Ch. 9.

Internationally, however, all these sources are no more than evidence of claims to territorial sovereignty. From the standpoint of international law, municipal law is no more than a fact. In consequence, municipal legislation purporting to delimit state territory is merely a claim to sovereignty, and not its determinant. The same applies to delimitation of the continental shelf. The same is also true a fortiori of, for example, more informal evidence of territorial claims in the form of governmental activities, official and unofficial maps.⁴⁴ When sovereignty over territory is in dispute, municipal law provides only a point of departure. It represents no more than a claim opposed by a similar claim on the part of another state. Thus, to take the most striking example, the Constitutions of both the Republic of Korea (South Korea) and the Korean Democratic People's Republic (North Korea) contain formal claims to sovereignty over the entire Korean peninsula.⁴⁵ Clearly these claims cannot be reconciled by reference to the municipal law of the claimants.

44. See e.g., Island of Palmas Arbitration, II RIAA, p.852-54; Clipperton Island Arbitration, II RIAA, p.1105; Delimitation of the Polish-Czechoslovak Frontier (Question of Jaworzina) Case, PCIJ Series B, No. 8, p.33; Delimitation of the Serbo-Albania Frontier (Question of the Monastery of Saint-Naoum) Case, PCIJ Series B, No. 9, p.21; Case concerning Sovereignty over Certain Frontier Land, ICJ Reports, 1959, p.209; Temple of Preah Vihear Case, ICJ Reports, 1962, p.22; Rann of Kutch Arbitration, 50 ILR, p.2, at pp. 105-113, 123-126, 420-423, 443-444, 485; Beagle Channel Arbitration, 52 ILR, p.165, 182, 203-206. See below, Chs. 2, 3, 4.

2.4 Boundaries and Frontiers

Boundaries and frontiers are elements of the landscape which mark either the de facto or de jure limits of political sovereignty.⁴⁶ In Pope et al v. Blanton, County Judge, et al., the United States, District Court, Northern District, Florida held that:

the right of the state to fix its boundaries has never been questioned by any nation, by the Congress, or before, by any citizen of the state, and this acquiescence over a long period of time in the establishment of the boundary of the state is not only entitled to consideration by a country in determining the right of the citizen to question the power of the sovereign state to change its boundary, but sufficient to stop the subject from questioning the right of the state to exercise dominion over its boundaries fixed by the Constitution and approved by the Congress.⁴⁷

The dividing line (the line of 'delimitation' or 'demarcation') between one political state and another, or

45. See e.g., Ch. 1, Art. 3 of the South Korean Constitution of 1962 which provides: 'The territory of the Republic of Korea shall consist of the Korean Peninsula and its adjacent islands'; Ch. 1, Art. 1 of the North Korean Constitution which provides: 'The Democratic People's Republic of Korea is an independent socialist State which represents the interests of all the Korean people' [italics added]. Cf. Art. 2 of the Constitution of Ireland of 1937 which provides: 'The national territory consists of the whole island of Ireland, its islands and the territorial seas' [italics added].
46. J.R.V. Prescott, The Geography of Frontiers and Boundaries (London: Hutchinson University Library, 1967), p.28.
47. 10 F. Supp. 18 (1935); 8 Annual Digest and Reports of Public International Law Cases (1935-1937), Case No. 57, p.171. Cf. Pope v. Blanton, 229 U.S. 521 (1936).

between administrative units or between geographical regions of various types is called a 'boundary'. It is generally defined as 'any separation, natural or artificial which marks the confines or line of two contiguous zones'.⁴⁸

In civil law, a boundary is an imaginary line which marks the confines or line of division of two contiguous estates. The boundaries can be fixed either by proved acts of the respective owners or by statutes or orders of the authorities having jurisdiction or in absence of such acts, statutes or orders by legal prescription. In international law, the major legal function of the boundaries and frontiers of a state is to delimit the area in which that state possesses the right to exercise jurisdiction to the exclusion of any other state. Accordingly it is clear that the international boundaries are the imaginary lines on the surface of the earth which separate the territory of one state from that of another, or from unappropriated territory, or from

48. The term 'boundary' is applied to include the objects placed on or existing at the angles of the frontier lines of separation. See Curtis M. Brown, Boundary Control and Legal Principles (New York: John Wiley, 1957), p.59. Boundary is usually defined by a certain mark, such as a post, ditch, hedge, dyke, wall of stones etc. It is used to indicate the line which divides one territorial entity from another. See J.R.V. Prescott, Frontiers and Boundaries, 2nd ed. (London: Groom Helm, 1978), Ch. 1.

the sea-bed and subsoil of the open sea.⁴⁹ In Manchester

v. Massachusetts, the Supreme Court of the United States said:

Within what are generally recognised as the territorial limits of states by the law of nations, a state can define its boundaries on the sea and the boundaries of its counties.⁵⁰

Thus the sovereignty of a state extends to the seaward limit of its marginal seas and seabed.⁵¹

Boundary delimitation, in principle, should be seen as a matter for the states concerned.⁵² It may be fixed by

49. D.W. Johnson, "The Role of Political Boundaries", 4 Geographical Review (1917), p.108; S.B. Jones, Boundary-Making, A Handbook for Statesmen, Treaty Editors and Boundary Commissioners (Washington: Carnegie Endowment for International Peace, 1945), p.7; L. Oppenheim, International Law: A Treatise, Vol. 1, 8th ed H. Lauterpacht (ed) (Longman, 1961), p.531; S. Whitemore Boggs, International Boundaries - A Study of Boundary Functions and Problems (New York: A.M.S. Press, 1966), Ch. 1, p.3; T.S. Murty, "Evidence on Traditional Boundaries and Some Problems in its Interpretation", 8 Indian J.I.L. (1968), p.484; P.K. Menon, "Settlement of International Boundary Disputes", 8 Anglo-American L.R. (1979), p.24.
50. 139 U.S. 264; Annual Digest and Reports of Public International Law Cases 1938-40, Case No. 52, p.138.
51. Art. 13, Draft Convention on the Territorial Waters, Harvard Research in International Law, 23 Special Number AJIL (1929), p.244. Cf. William E. Masterson, Jurisdiction in Marginal Seas with Special Reference to Smuggling (New York; The MacMillan Co., 1929), Pt. v, pp. 375 et seq; Geoffrey Marston, The Marginal Seabed (Oxford: Clarendon Press, 1981), pp. 260-69. See below, Ch. 5.
52. In the Anglo-Norwegian Fisheries Case, the Court said that the delimitation of sea areas has always an 'international aspect'. ICJ Reports, 1951, p.132. In the North Sea Continental Shelf Cases, the Court emphasised that delimitation must be the object of agreement between the states concerned. ICJ Reports, 1969, p.3. Cf. I. Bernstein, Delimitation of International Boundaries (Tel Aviv U.P., 1974). See below, 3.2.

a treaty between two or more adjacent states, or by a unilateral act - of occupation, annexation, prescription etc. Since boundaries have been of critical importance in inter-state relations the view has been held that they should generally not be disturbed. This recognition of boundaries may be tacit or stipulated by international agreement. Some Afro-Asian states have raised the question of boundaries established at the time when these countries were under colonial domination. It seems, however, that most Afro-Asian countries have declared themselves in favour of the principle of uti possidetis,⁵³ which was applied in Latin America in the nineteenth century during the liberation of the former Spanish colonies and which provided that boundaries between Latin American states should correspond to the administrative boundaries which existed between different parts of the Spanish colonial empire.⁵⁴

53. Uti possidetis, ita possideatis means 'as you possess, you shall continue to possess'. The term is derived from classical Roman Law in which it was used to denote an edict of the praetor, the purpose of which was to preserve, pending litigation, an existing state of actual possession of real property nec vi, ne clam, ne precaris between individual claimants. J.B. Moore, Memorandum on Uti Possidetis: Costa Rica - Panama Arbitration, 1911 (Rosslyn, Va.: The Commonwealth Co., 1913), p.5. See also J.H.W. VERIJL, International Law in Historical Perspective, Vol. 8 (Leyden: A.W. Sijthoff, 1976), p.301.
54. Uti possidetis could be described as a form of 'critical date'. The technical learning about the 'critical date' (i.e. the date by reference to which a territorial dispute must be deemed to have crystallised) is important in territorial disputes ; it has become increasingly important since the arguments before the ICJ in the Minquiers and Ecrehos Case (ICJ Reports, 1953, p.47) made it inevitable that/

One vexed issue, in writings on international boundaries, is that of terminology. From a practical point of view, it is evident that states may be divided by what is notionally a widthless line - marked as such on maps and perhaps clearly delineated, by boundary posts, for example, on the ground. Alternatively, states may be separated by zones, which may be of undetermined width and which usually take the form of relatively unpopulated areas or impassable physical features, such as mountain ranges, deserts, rivers, swamps, lakes,

that in the Argentine-Chile Boundary Arbitration (XVI RIAA, p.115) and in the Rann of Kutch Arbitration (50 ILR, p.2) the respective Parties endeavoured to raise arguments concerning the critical date. For details, see L.F.E. Goldie, "The Critical Date", 12 ICLQ (1963), p.1251. In the case of South America the 'critical date' was generally taken to be 1810. See, e.g., the Bolivia-Peru Boundary Arbitration (1922), XI RIAA, p.141; the Colombia-Venezuela Boundary Arbitration (1922), I RIAA, p.223. In Central America the 'critical date' was 1821. Art. 5 of the compromis between Guatemala and Honduras of 1930, 137 LNTS (1933), No. 3159, p.232. By contrast, the delegation of Afghanistan observed that in Latin America most boundary disputes had been settled by arbitration and that one could not say, in the circumstances, that the old principle of uti possidetis had been applied. II YBILC (1974), p.73; Suzanne Bastid, "Les problemes territoriaux dans la jurisprudence de la cour internationale de Justice", 107 Recueil des Cours (1962), p.489.

troughs, valleys and canyons.⁵⁵ In the case of a zonal division, we may expect the zone to be accompanied by a boundary.

Empires in the past usually preferred frontiers to boundaries as surrounds for the peripheries of their territorial jurisdictions. Frontier zones were thus regarded as buffers or insulation belts, which might be neutral zones⁵⁶ but were more likely to be areas of suzerainty.⁵⁷ In the modern international community of nation-states, boundaries, which are lines of political delimitation and demarcation, are the convention and are internationally sanctioned notions of political legitimacy, and are further encouraged by modern

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55. C.B. Fawcett, Frontier: A Study in Political Geography (Oxford: Clarendon Press, 1918), pp. 5-6; Boggs, op. cit., p.22; A.O. Cukwurak, The Settlement of Boundary Disputes in International Law (Manchester U.P., 1967), pp. 11 et seq. For troughs, see below, Ch. 7.
56. It has been suggested that a zone of the sea-bed and subsoil lying between the 200 metre isobath and the continental rise should be brought under some kind of a compromise regime and has been formulated in terms of several different proposals. Those of most interest are Professor Henkin's buffer zone [Louis Henkin, Law for the Sea's Mineral Resources, ISHA Monograph No. 1 (Columbia Univ., 1968), pp. 46-48]; the Stratton Commission's "intermediate zone" (Stratton Commission Report, pp. 151-53) and the "trusteeship zone" recommended in the 1970 United States Draft Convention on the International Seabed Area (UN Doc. A/AC.138/25; UN Doc. A/8021 (1970)). For discussion, see R.Y. Jennings, the United States Draft Treaty on the International Seabed Area - Basic Principles, 20 ICLQ (1971), pp. 433-52. See below, Ch. 6.
57. In the Minquiers and Ecrehos Case, France asserted that contemporary suzerainty was sufficient to found a title in the French King over the disputed islets which had not been subsequently displayed. ICJ Reports, 1953, p.75.

systems of communication and techniques of map-making. Frontiers have become obsolete, and boundaries are the standard form.⁵⁸

A useful distinction has been made between the terms 'boundary' and 'frontier'. A boundary is a clear divide between sovereignties which can be marked as a line on a map.⁵⁹ It has, as it were, length but not area, e.g. the Curzon Line between Russia and Poland, the McMahon Line between India and Tibet,⁶⁰ the MacArthur Line and the Rhee Line between Japan and South Korea demarcating exclusive fishery zones off their coasts,⁶¹ the Brevie Line between Vietnam and Kampuchea;⁶² the 17th parallel in Vietnam, the

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58. Peter Lyon, "Regional Organisations and Frontier Disputes", Evan Luard (ed) The International Regulation of Frontier Disputes (London: Thames & Hudson, 1970), pp. 112 et seq.
59. Alastair Lamb, Asian Frontiers: Studies in a Continuing Problem (London: Pall Mall, 1968), p.4; John Burke (ed) Jowitt's Dictionary of English Law, 2nd ed. Vol. 1 (London: Sweet & Maxwell, 1977), pp. 243-44.
60. For details, see Alastair Lamb, The McMahon Line: A Study in the Relations between India, China and Tibet, 1904 to 1914, Vols. I and II (Toronto: University of Toronto Press, 1966).
61. Guenter Weissberg, Recent Developments in the Law of the Sea and the Japanese-Korean Fishery Dispute (The Hague: Martinus Nijhoff, 1966), pp. 6,8,10-14,76,77,95; Choon-ho Park, "Marine Resource Conflicts in the North Pacific", in Douglas M. Johnston (ed), Marine Policy and the Coastal Community (London: Groom Helm, 1976), pp. 220-22.
62. The Brevie line was named after a French Governor-General and was drawn originally in 1939 to divide the administrative and police jurisdiction between the French colony of Cochinchina and the protectorate of Cambodia. Although it was accepted by both sides as the de facto line of control, Vietnam has not accepted the Brevie line as the 'state frontier'. The Kampucheans, however, do not see the Brevie line as merely a line for administrative and police jurisdiction but think of it as the 'state frontier'. Lee Yong Leng "Offshore Boundary Disputes in Southeast Asia", Journal of Southeast Asian Studies (Nov. 1978), p.182. See also Far Eastern Economic Review (3 Feb. 1978), p.23.

38th parallel in Korea and the 49th parallel separating Canada from the United States - these are also examples of boundaries in this sense.⁶³ A frontier, as that term was understood by authorities on British imperial border questions, such as Lord Curzon and Sir Henry McMahon, is a Zone rather than a line.⁶⁴ It is a tract of territory separating the centres of two sovereignties, e.g. the North-West Frontier: the zone lying between the British-administered territory of the Indus plains and the sphere of authority of the Afghan government. A frontier zone may well be of very extensive area, and a dispute over the exact whereabouts of a boundary line through a frontier zone can involve large tracts of

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63. Lamb, Asian Frontiers, p.4. See below, 3.2.3.

64. A frontier is a region or zone having width as well as length. Jowitt's Dictionary of English Law, Vol. 1, p.279. In the reign of Antoninus Pius (AD 81-161) Rome extended its occupation of Britain to the line of the Forth and Clyde, and defended its most northerly frontier of the Empire with a fortified wall extending from Bridgeness 37 miles west, to Old Kilpatrick. See William Hanson and Gordon Maxwell, Rome's Most Northerly Frontier: The Antonine Wall (Edinburgh U.P., 1982). Cf. E.H. Hills, "The Geography of International Frontiers", 28 Geographical Journal (1906), p.146; Thomas Holdich, "Political Boundaries", 32 Scottish Geographical Magazine (1916), p.501; Modesto Seara Vazquez, "Zones of Influence", 27 YBWA (1973), p.301.

territory.⁶⁵ The Sino-Indian boundary dispute,⁶⁶ because it concerns such a line through a frontier zone, involves more than 50,000 square miles of territory. Thus, the Sino-Indian border along the Himalayas represents a frontier rather than a boundary. Moreover, on 29 November 1954, an Agreement was concluded between Great Britain and Ethiopia whereby the British Military Administration was withdrawn from certain regions adjoining the frontier of British Somaliland. The Agreement contains a Schedule describing the regions from which the British Administration was to be withdrawn, and this was accepted and recognised as an international frontier between Ethiopia and the Somaliland.⁶⁷

65. Lamd, Asian Frontiers, p.4.

66. See generally, A.P. Rubin, "The Sino-Indian Border Disputes", 9 ICLQ (1960), p.96; K.K. Rao, "The Sino-Indian Boundary Question and International Law", 11 ibid., (1962), p.375; idem, "The Sino-Indian Boundary Question: A Study of Some Related Legal Issues", 3 Indian J.I.L. (1963), p. 151; W.F. Van Eckelen, Indian Foreign Policy and the Border Dispute with China (The Hague: Martinus Nijhoff, 1964); S.P. Sharma, "The Indian-China Border Dispute: An Indian Perspective", 59 AJIL (1965), p.16; Alastair Lamb, The China-India Border; The Origins of the Disputed Boundaries (Oxford U.P., 1964), p.1; idem, The McMahon Line, loc. cit.; idem, "Treaties, Maps and the Western Sector of the Sino-Indian Boundary Dispute", 1 Australian YBIL (1965), p.37; A.O. Cukwurah, The Settlement of Boundary Disputes in International Law (Manchester U.P., 1967), p.153; G.N. Rao, The India-China Border: A Reappraisal (London: Asia Publishing House, 1968); J.E.S. Fawcett, "General Course on Public International Law", 132 Recueil des Cours (1971-I), p.441. See below, 4.1 and Ch. 2.

67. BTS, No. 1 (1955), Cmd. 9348. For discussion, see D.J.L. Brown, "The Ethiopia-Somaliland Frontier Dispute", 5 ICLQ (1956), p.245.

Although in common parlance, the words 'boundary' and 'frontier' are used interchangeably, there is a clear difference between them; the distinction is endorsed by Kristof:

The boundary is defined and regulated by law, national and international, and as such its status and characteristics are more uniform and can be defined with some precision. But the frontier is a phenomenon of history; like history it may repeat itself, but, again like history, it is always unique. It is difficult to pinpoint essential features of the frontier which are universally valid.⁶⁸

The distinction between a 'boundary' and 'frontier' is legally significant. In the Rann of Kutch Arbitration,⁶⁹ for example, between India and Pakistan in 1968, it was

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68. Kristof, "The Nature of Frontier and Boundaries", 49 Annals of the Association of American Geographers (1959), p.273.
69. The Indo-Pakistan Western-Boundary Case Tribunal Award, 19 February 1968 (Government of India Press, 1968); 7 ILM (1968), p.633; 50 ILR (1976), p.2. For discussion, see A.L.W. Munkman, "Adjudication and Adjustment - International Judicial Decision and the Settlement of Territorial and Boundary Disputes", 46 BYIL (1972-73), p.70; C.J. Chacko, "The Rann of Kutch and International Law" 5 Indian J.I.L. (1965), p.147; R. Khan, "Relinquishment of Title to Territory - The Rann of Kutch Award - A Case Study" 9 Indian J.I.L. (1969), p.157; Mukund G. Untawale "The Kutch-Sind Dispute: A Case Study in International Arbitration" 23 ICLQ (1974), p.818; T.S.R. Rao, "An Appraisal of the Kutch Award", 9 Indian J.I.L. (1969), p.143; R.P. Anand, Studies in International Adjudication (Delhi: Vikas Publ. 1969), p.218; J.G. Wetter, "The Rann of Kutch Arbitration", 65 AJIL (1971), p.346; D.H.N. Johnson, "International Arbitration Back in Favour?", 34 YBWA (1980), p.305, at pp. 320-22. See below, Ch. 2.

contended by Pakistan that the area of the Rann⁷⁰ formed in its entirety a part of the boundary between Pakistan and India - i.e. the Rann was a 'frontier' - and that no 'boundary' in the sense of a widthless line had ever been established. India, on the other hand, contended that the boundary ran roughly along the northern edge of the Rann; this was the boundary shown in pre-partition maps, and was the 'traditional, well-established and well-recognised boundary'. The Tribunal was required by both parties to decide inter alia whether the boundary in dispute was a historically recognised and well-established boundary. It held that the Rann constituted a broad belt of boundary between the neighbouring countries. There was no historically recognised and well-established boundary in the area in dispute. If the Tribunal had accepted Pakistan's argument in its entirety, and had therefore accepted

70. The Ranna in this case was described by Judge Gunnar Lagergren as 'a unique geographical phenomenon' and by Judge Bebler as 'a peculiar surface, most akin to marsh or swamp'. Its peculiarity lies in the fact that the Rann is sometimes a desert and is sometimes flooded with water. This led Pakistan to describe it as 'a marine feature' whilst India considered it to be land. Pakistan claimed that the boundary should run through the middle of the Rann, while India contended that the entire Rann was Indian territory. Johnson, op. cit., 34 YBWA (1980), pp. 320-21. Long before the creation of Pakistan, the then Foreign Department of the British Government of India made it clear in 1906 that it was more correct to define the Rann of Kutch as 'marsh' than as a 'lake' or 'inland sea'. K.K. Rao, The Kutch-Sind Border Question (The Indian Society of International Law, 1965).

that its duty under the terms of the compromis was to reduce a 'frontier' zone to a 'boundary' line, then Pakistan's claim for the division of the Rann between the two parties on the median-line principle would no doubt have been successful.

At present, a frontier of a state is not just represented by a line but by a plane which vertically delimits the land, sea and air space of a state, including the seabed and subsoil.⁷¹ Delimitation of liquid mineral deposits (whether fluid or gaseous) which extend across a natural frontier on land territory or a boundary line on the continental shelf between adjacent or opposite states requires cooperation between neighbouring states as regards common deposits of oil and gas.⁷² It is noteworthy that to draw a boundary line in accordance with the proper principles and rules relating to the determination of boundaries is one thing, but how to divide an area with an underlying "deposit" is another thing.⁷³

71. Cf. J.V.R. Prescott, The Political Geography of the Oceans (London: David & Charles, 1975). See below, 4.4.

72. See, e.g., Art. 4 of the 1965 Agreement between the U.K. and Norway relating to the Delimitation of the Continental Shelf. Norway No. 1 (1965), Cmnd. 2626; the 1965 Agreement between the U.K. and the Netherlands relating to the Exploitation of Single Geological Structures Extending Across the Dividing Line on the Continental Shelf of the North Sea, Netherlands No. 2 (1965), Cmnd. 2831. See below, Ch. 7.

73. See, e.g., Art. 46(1) of the 1960 Treaty between the Netherlands and the Federal Republic of Germany concerning Arrangements for Cooperation in the Ems Estuary which states that 'this Treaty shall not affect the question of the course of the international frontier in the Ems Estuary. Each Contracting Party reserves its legal position in this respect'. 509 UNTS (1964) No. 7404, p.4, at p.94. It may be appropriate to mention here that, when/

The territorial sea as a maritime space is inseparably connected with the land territory of which it is an appurtenance. The state's authority over the mineral resources of its land territory and territorial sea is based on the concept of territorial sovereignty as an essential part of its legal personality; its sovereign rights over the mineral resources in the soil and subsoil of its continental shelf, however, are derived from the geographical concept of natural prolongation.⁷⁴ The question of delimitation of the maritime and submarine boundaries can also be answered by reference to the fundamental principles of territorial sovereignty.⁷⁵ This rule has been succinctly stated by Richards in the following terms:

Sovereign States are entitled to all those rights which are necessary for the preservation and protection of their territories.⁷⁶

when analysing the former Judgment of the ICJ on "Contestations relatives au tracé de la frontière", Dr. Bastid has noted that in them 'can be discerned certain tendencies showing that there is a distinction to be made between conflicts concerning frontiers and those to do with the attribution of a territory'. Suzanne Bastid, "Les problèmes territoriaux dans la jurisprudence de la cour internationale de justice", 107 Recueil des cours (1962-III), p.452.

74. The North Sea Continental Shelf Cases, ICJ Reports, 1969, p.31. Cf. the Anglo-French Continental Shelf Arbitration, 54 ILR (1979), pp.89-90, 93-94, 99-101; the Aegean Sea Continental Shelf Case, ICJ Reports, 1978, p.3. See below, Chs. 5 and 7.
75. On 28 January, 1981, Dom Mintoff, Prime Minister and Minister of Foreign Affairs of the Republic of Malta, informed the Registrar of the ICJ that 'Malta's interest in her continental shelf boundaries is of a legal character since the continental shelf rights of states are derived from law, as are also the principles and rules on the basis of which such areas are to be defined and delimited'. 20 ILM (1981), p.330.
76. D.H.N. Johnson, "The Contribution of Sir Erle Richards to the Science of International Law", 39 BYIL (1963), p.378.

3. Chronological Stages of Establishment of International Boundaries

An international boundary separates the territorial limits of neighbouring states. It marks the limits of the region within which the state can exercise its own sovereign rights.⁷⁷ It is plain that territorial boundaries are always determined by political and not judicial action. For instance, in a controversy between the United States and a foreign state as to its boundary, the Courts will follow the decision of those departments of the Government to which the assertion of its interests against foreign states is confided, i.e. the legislature and executive.⁷⁸

Lapradelle and Jones have both adopted a convenient terminology for analysing the stages in the history of a boundary: allocation, delimitation, demarcation and administration. As Jones puts it:

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77. V. Adami, National Frontiers in Relation to International Law (London: T.T. Behrens, 1927), p.3; S.P. Sharma, International Boundaries Disputes and International Law: A Policy Oriented Study (Bombay: N.M. Tripathi Private Ltd., 1976), p.3; P.K. Menon, "International Boundaries - A Case Study of the Guyana-Surinam Boundary", 27 ICLQ (1978), p.738.
78. See, e.g., Foster v. Neilson, 2 Peters, 253; Garcia v. Lee, 12 ibid., 511; Williams v. Suffolk Ins. Co., 13 ibid., 415; U.S. v. Reynes, 9 Howard 127. Cf. Francis Wharton (ed), A Digest of the International Law of the United States, Vol. 1 (Washington: Government Printing Office, 1886), Ch. 1, para. 22.

In respect to governmental processes, there are four main stages in the history of a boundary: (1) political decisions on the allocation of territory, (2) delimitation of the boundary in a treaty, (3) demarcation of the boundary on the ground, and (4) administration of the boundary. Chronologically, these stages may overlap, may succeed each other promptly, or may be separated by gaps of many years. Allocation and delimitation may take place at a single conference. On the other hand, a general allocation of territory may be agreed upon long before boundaries are delimited. One part of a boundary may be demarcated before others are delimited. There are boundaries formally delimited years ago that have not yet been demarcated. Some boundaries have remained unadministered for many years, while others have been under de facto administration before they were delimited, or even⁹ before the final allocation of territory was decided.

This analysis affords both a useful terminology and a convenient classification into which legal issues relating to territory and boundaries may be fitted. It cannot, however, be accepted in its entirety without comment.

3.1 Allocation:

In using the phrase 'allocation of territory', Jones appears to be thinking primarily in terms of 'political' decisions by international conferences, such as those taken by the Paris Peace Conference after the First World War. The term is also appropriate to describe other formal bilateral or multi-lateral arrangements acknowledging or transferring sovereignty or sovereign rights over territory. It is not,

79. Jones, op. cit., p.5 [italics added]. Cf. J.R.V. Prescott, Political Geography (London: Methuen, 1972), p.63. Cf. Paul de Lapradelle, La Frontiere Etude de droit international, Les Editions Internationales (Paris: etude de droit international, 1928), pp. 132-40.

however, a term of legal import in the sense that one might speak of a title to territory by allocation. Thus, this reference to allocation as the primary purpose of boundaries is not a reflection of legalism but accords with the attitudes of the politicians who make territorial arrangements.⁸⁰

3.1.1 Land Frontiers

A political decision on the allocation of territory might be made - such as the General Assembly Partition Resolution on Palestine⁸¹ - which imposed no legal obligation to accept it, and from which it would therefore be inappropriate to derive a title to territory. Nevertheless, if the parties to a territorial dispute have entrusted its solution to a tribunal, and that tribunal 'allocates' the territory to

80. Ian Brownlie, African Boundaries: A Legal and Diplomatic Encyclopaedia (London: C. Hurst; University of California Press: Berkeley and Los Angeles, 1979), p.3. Cf. A.C. McEwan, International Boundaries of East Africa (Oxford: Clarendon Press, 1971), Ch. 2, p.11. On 27 September 1961, the United States joined with the States of Delaware, New Jersey and New York and the Commonwealth of Pennsylvania in the Delaware River Basin Compact. The Compact created the Delaware River Basin Commission and empowered it to allocate the waters of the basin to and among their respective political subdivisions, 75 Stat. 688-89, 691-93, 712-13.

81. With regard to the resolution of the General Assembly on 29 November 1947 in favour of the partition of Palestine, see A/Res. 181 (II), UN Doc. A/519. In 1946, the British Government insisted that the eastern part of Palestine be called 'the Kingdom of Transjordan'. It is now called 'the Kingdom of Jordan' and it occupies approximately 77 per cent of the area of the former mandated territory of Palestine. For details, see M. Cohen, Palestine: Retreat from the Mandate: The Making of British Policy, 1936-1945 (Oxford U.P., 1978); Mohammed K. Shadid, The United States and the Palestinians (London: Groom Helm, 1981); E. Lauterpacht, Jerusalem and the Holy Places, Anglo-Israel Associated Pamphlet No. 19 (London, 1968); Henry Cattán, Palestine and International Law (London: Longman, 1973). See below, 4.2.2.

(or divides it between) one or other party, then it may be not inappropriate to describe the 'allocation' (or, in the case of an arbitral or judicial tribunal, the appropriate term would be 'adjudication') as the root of title. Even in this case, however, a formal agreement between the parties will normally follow the decision of the tribunal. Moreover, the successful party may rely on some prior 'title' upon which its claim had originally been based.

There are, however, certain cases in which a 'political decision on allocation of territory' may well constitute a root of title. Thus the Delimitation of the Polish-Czechoslovakian Frontier (Question of Jaworzina),⁸² the Delimitation of the Serbo-Albanian Frontier (Question of the Monastery of Saint-Naoum),⁸³ and the Frontier Between Turkey and Iraq (Mosul Boundary)⁸⁴ cases are the obvious examples. In these cases, the PCIJ, in effect, gave decisions on the allocation and delimitation of frontiers on the basis of status quo ante.

International agreement may determine the sovereignty, administration or use of hitherto unclaimed areas or resources, or of areas or resources to which claims of doubtful legal

82. PCIJ Ser. B, No. 8. See below, 3.1.2 and Ch. 2.

83. PCIJ Ser. B, No. 9. See below, Ch. 2.

84. PCIJ Ser. B, No. 12. In the British Guiana Boundary and the Rann of Kutch Arbitrations decisions on allocation of substantial portions of territory and on the delimitation of the boundary between the areas awarded to each party were combined. See respectively, II RIAA, p.11; 50 ILR (1976), p.2. See below, Ch. 2.

validity have been made. The partition of the New World and of Africa, of maritime and submarine areas, air and outer space, and the polar regions, are cases in point. International agreement may also determine the allocation of 'Mandate' and 'Trust' territories,⁸⁵ or establish new states.

3.1.2 Maritime Zones

Apart from rivers, even substantially enclosed maritime areas were regarded as being under the jurisdiction of the sovereign of the surrounding land. Thus, Vattel said:

If a sea is entirely inclosed within national territory and connects with the ocean only by a channel of which the Nation can take possession, it would seem that such a sea is no less susceptible of occupation and ownership than the land, and it should come under the same jurisdiction as the land surrounding it. The Mediterranean Sea was in former times completely surrounded by Roman territory, and the Romans, by making themselves masters of the strait connecting it with the ocean, could subject that/

85. The Mandate is an exalted form of trust. It makes the object of every Mandate not merely the protection of the funds and property of one or more beneficiaries, but, under Article 22 of the Covenant of the League of Nations, it establishes the fundamental rule that the Mandate must be administered for 'the well-being and development of peoples not yet able to stand by themselves under the strenuous conditions of the modern world'. See generally, D. Campbell Lee "Mandate: How they are working?", 12 Transactions of the Grotius Society (1926), pp. 31-47; James C. Hales, "Some Legal Aspects of the Mandate System: Sovereignty - Nationality - Termination and Transfer", 23 ibid (1937), pp. 85-126; Norman Bentwich, The Mandate System (London: Longmans, Green & Co., 1930), p.135. Cf. International Status of South West Africa (Advisory Opinion) Case, ICJ Reports, 1950, p.128; South-West Africa - Voting Procedure (Advisory Opinion) Case, ICJ Reports, 1955, p.67.

that sea to their sovereignty and claim the ownership of it. They did not violate, in so doing, the rights of other Nations, since an individual sea is clearly destined by nature to the use of the countries and Nations which surround it.⁸⁶

It may be discerned that in this passage Vattel was not so careful in the case of maritime areas as he was concerning land areas to distinguish the acquisition of sovereignty or imperium from the acquisition of ownership or dominium.⁸⁷

He admitted that the sea near the coasts of a state might be appropriated to some extent. He, however, justified this ownership of sovereignty on a number of grounds, and, although in his discussion he uses both the terms 'ownership' and 'sovereignty', his use of them is perhaps not wholly indiscriminate since it bears some apparent relationship to their justification. Larger areas might only be placed under the imperium, that is, power or jurisdiction of a state.

86. E. de Vattel, Le Droit des Gens, Vol. III, English trans. by Charles G. Fenwick (1758; rpt. Washington: the Carnegie Institute, 1916), Bk. I, Ch. XXIII, p.110, para. 294.

87. The term dominium is usually translated as 'ownership', and it describes the right of property of the individual in the land which he may own, and that of the Nation or State, considered as a collectivity of individuals in its territory. Imperium is usually translated into English as 'sovereignty' or, by the older writers, as 'Empire'. See L. Oppenheim (ed) The Collected Papers of John Westlake on Public International Law (Cambridge U.P., 1914), pp. 134-35. Cf. Sir Henry Sumner Maine, Lectures on the Early History of Institutions, Second impression of the seventh ed. (London: John Murray, 1905), Lecture XIII, p.371.

It is interesting here to recall that Grotius also refers to the possibility of sovereignty over the sea being acquired 'by means of territory, in so far as those who sail over the part of the sea along the coast may be constrained from the land no less than if they should be upon the land itself'.⁸⁸

In fact, it would appear from the type of claims made that the possibility of constraint from the shore, and therefore the relevance of even a notional cannon-shot range,⁸⁹ was significant only in claims to areas of sea which were deemed part of the territory of the coastal state for the purpose of excluding hostilities from the neighbourhood of neutral states.

Indeed, a state may have a peculiar possession of portions of the sea, so as to exclude the universal or the common use by other states. Sir William Scott held in The Twee Gebroeders, Northolt Master, that portions of the sea might be acquired by prescription, just as rivers can when they flow through contiguous states: the banks on one side may have been first settled, by which fact the possession and property may have

88. Hugo Grotius, De Jure Belli ac Pacis, Vol. II, English trans. by Francis W. Kelsey (1646; rpt. Oxford: Clarendon Press, 1925), Bk. II, Ch. III, XIII, p.214.

89. Bynkershoek declared that potestatem terrae finitur armorum vis, the control from the land ends with the range of weapons. Cornelius van Bynkershoek, De Dominio Maris Dissertatio, English trans. by Ralph van Deman Magoffin (1774; rpt. New York: Oxford U.P., 1923), Ch. II; Cf. J.K. Oudendijk, Status and Extent of Adjacent Waters (Leyden: A.W. Sijthoff, 1970) pp. 68, 107.

been acquired, or cessions may have taken place upon conquests, or other events. But the general presumption certainly bears strongly against such exclusive rights and the title is a matter to be established, on the part of those claiming under it, in the same manner that all other legal demands are to be substantiated by clear and competent evidence,⁹⁰ i.e. by proof of ancient and constant usage.

This view has been repeated in the case of the Le Louis, Forest of 1817.⁹¹ A French vessel, the Le Louis, which sailed from Martinique to the coast of Africa and back, was captured ten or twelve leagues to the southward of Cape Mesurada by the British Queen Charlotte cutter and carried to Sierra Leone. Action was brought against her in the vice-admiralty court of that colony for being concerned in the slave-trade contrary to the French law. Lord Stowell held that:

maritime states have claimed a right of visitation and enquiry within those parts of the ocean adjoining to their shores, which the common courtesy of nations has for their common convenience allowed to be considered as parts of their dominions for various domestic purposes, and particularly for fiscal or defensive regulations, more immediately affecting their safety and welfare. Such are ... hovering laws, which within certain limited distances more/

90. (1801) 3C. Rob. 336, 339. In the Schooners Fame, Mr. Justice Story deemed it possible that a state might have an exclusive use founded on the acquiescence or tacit consent of other states. 3 Manson's American Reports, p.150.

91. J. Dodson, Reports of Cases Argued and Determined in the High Court of Admiralty, Vol. II (London: Joseph Butterworth, 1828), p.120.

more or less moderately assigned, subject foreign vessels to such examination. This has nothing in common with a right of visitation ⁹² and search upon the unappropriated parts of the ocean.

There is no inconsistency between these views and those of Grotius, who says that one who has occupied a part of the sea cannot hinder navigation which is without weapons and of innocent intent, and when such a passage cannot be prevented by land, and when it is generally less necessary and more likely to produce damage;⁹³ for Grotius must be understood to be speaking of the natural right of a state, and not of an instituted right founded on the tacit consent of other states.

Russia endeavoured in the last century to revive the old controversy in connection with the Behring Sea and Alaska, and later the United States claimed maritime areas as successors to Russian dominion over Alaska beyond the Bynkershoek limit, but without success.⁹⁴ The Arbitral

92. Ibid., pp. 245-46. [italics added].

93. De Jure Belli ac Pacis, Bk. II, Ch. III, XII, p.212; Cf. Samuel Pufendorf, De Jure Naturae et Gentium (1688; rpt. Oxford: Clarendon Press, 1934) Bk. IV, Ch. V. Sec. 8, p.563.

94. The U.S. claims following the purchase of Alaska from the U.S.S.R. in 1867 to an extent of water 150 miles by 700 were derived from a Russian ukase, the revocation of which the United States had been instrumental in procuring. Great Britain, however, rejected the American arguments, and denied that Russia had ever exercised jurisdiction over the maritime areas in dispute, which had always been visited by trading vessels of all nations. For historical background, see Lord McNair, International Law Opinions, Vol. I (Cambridge U.P., 1956), p.241; T.W. Fulton, The Sovereignty of the Seas (Edinburgh & London: William Blackwood & Sons, 1911), pp. 581-85, 696; J.B. Moore, International

Tribunal, in the Behring Sea Fur Seal Arbitration of 1893, manifested the prohibition of acquisition of territorial sovereignty over the high seas.⁹⁵ After having acquired sovereignty over Alaska, the United States extended its territorial jurisdiction and control, and made regulations regarding seal fishing in a part of the high seas in the Behring Sea. In 1886 the United States seized British vessels engaged in seal fishing in the Behring sea, outside territorial waters. By a compromis of 1892, Great Britain and the United States agreed to submit this dispute to an Arbitral Tribunal.⁹⁶

International Arbitrations, Vol. I, Ch. XVII, pp. 755-917; M.S. McDougal and W.T. Burke, The Public Order of the Oceans (New Haven & London: Yale U.P., 1962), pp. 942, 948-49, 965; D.M. Johnston, The International Law of Fisheries (New Haven & London: Yale U.P., 1965), pp. 205-12. William E. Butler, The Soviet Union and the Law of the Sea (Baltimore & London: The Johns Hopkins Press, 1971), pp. 26 et seq.

95. Report of Proceedings of the Tribunal of Arbitration 1895; Award of Tribunal appended Pt. XIII. See also 9 BFSP (1821-22); 12 ibid., (1824-25); 57 ibid., (1866-67); 79 ibid., (1887-88); 81 ibid., (1888-89); 90 ibid., (1897-98). For summary, see Moore, International Arbitrations, Vol. 1, p.945.
96. The questions which have arisen between the U.S. and Great Britain concerning the jurisdictional rights of the U.S. in the waters of the Behring Sea, and concerning also the preservation of the fur seal in or habitually resorting to the said sea, and the rights of the citizens and subjects of either country as regards the taking of fur-seal in or habitually resorting to the said waters, shall be submitted to a tribunal of arbitration. See Art. I of the compromis of 1892; 84 BFSP, p.48.

The arbitrators recommended a regime based upon a more rational application of the lex lata. It should be noted that this Court, as a Court of law, could not render judgment sub specie legis ferendae.⁹⁷ This Award decided mainly in favour of Great Britain,⁹⁸ stating that the United States could not exercise rights of sovereignty over any part of the high seas. The effect of this award on the positive rules of international law was twofold. First, the invalidity of the American claims to a right in ownership in the fur-seals while in the high seas, outside the three mile limit,

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97. Anticipate the law before the legislator has laid it down. More recently, in the South West Africa (Judgment) Cases, the Court stated that its duty was to apply law as it found it, not to make it. ICJ Reports, 1966, p.48, para. 91; Fisheries Jurisdiction (Merits) Case, ICJ Reports 1974, pp. 23-24; Texaco v. Libyan Arab Republic, 53 ILR (1979), p.483.
98. Claim of pelagic ownership in favour of Great Britain; admission of the necessity for regulation of pelagic sealing and of their proposals for doing so in favour of U.S.A. The immense documentation of the case fills eight volumes of the Command Papers for 1893, while the diplomatic correspondence occupies a very large space in the State Papers from 1887 to 1892. A succinct summary is to be found in H.A. Smith, (ed) Great Britain and the Law of Nations, Vol. II (London: P.S. Kings & Sons, 1935), pp. 99-109; Johnston, op. cit., pp. 205-12; T.B. Browning, "The Behring Sea Question", 7 LQR (1891), pp. 128-149; idem, "The Behring Sea Question", ibid., pp. 199-200; idem, "Natural Law and the Behring Sea Question", ibid., pp. 315-36; William Williams, "Reminiscences of the Behring Sea Arbitration", 37 AJIL (1943), p.562. Cf. The Franconia (R. v. Keyn) (1876) 2 Ex. D. 63, in which the British claim to jurisdiction over the seas around its islands.

was established. Secondly, Roman law maxims, the foundation of so much international law, were proved inadequate to decide modern international relations. It is plain that a most inappropriate strain is put upon the Roman rule when its test of private ownership of animals and land, the animus revertendi, is made to do duty in decisions regarding the public ownership of animals ferae naturae in the high seas.⁹⁹

In the Award of the Grisbadarna Arbitration¹⁰⁰ among the reasons given by the allocation of the Grisbadarna bank to Sweden was that Sweden had performed various acts in the Grisbadarna region (for instance, the placing of the beacons, the measurement of the sea and the installation of a light boat¹⁰¹) acts which involved considerable expense.

99. Award, Point 5: "The United States has not any right of protection or property in the fur-seals frequenting the islands of the United States in Behring Sea. When such seals are found outside the ordinary three-mile limit". Cf. M.J. Farrelly, "Recent Questions of International Law", 10 LQR (1894), p.254-55. For interpretation of the Award, see The Ship "Oscar and Hattie" v. Reg. (1894); Reg. v. The Ship "Shelby" (1895) and Reg. v. The Ship "Viva" (1896). Moore, International Arbitrations, Vol. 1, Case Nos. 50, 53 and 55 respectively.

100. [1909] XI RIAA, p.147. English trans. in 4 AJIL (1910), p.233; J.B. Scott, The Hague Court Reports (New York: Oxford U.P., 1916), p.121, at p.130. See below, 4.1. and Chs. 4 and 6.

101. In the Minquiers and Ecrehos Case, French activity was notable in the nineteenth and twentieth centuries in relation to the Minquiers in particular; hydrographic surveys and the placing of buoys outside the reefs of the Channel. The Court held that the French buoy-laying outside the reefs cannot be considered as a manifestation of state authority over the islets. ICJ Reports, 1953, pp. 70-71. In the Frontier Land Case, the Netherlands asserted that tax had been collected by her from the disputed plots. ICJ Reports, 1959, p.228. See below, Ch. 2.

In doing so, Sweden was not only exercising its right but even more was performing its duty; whereas Norway showed much less solicitude in this region in these various regards.

Under the international law of the sea at that date, the maritime area was allocated into three zones, distinguished by the nature of the control which the coastal state can exercise over them.¹⁰² Nearest to the state's shores are its inland, or internal waters. Beyond the inland waters, and measured from their seaward edge, is a belt known as the marginal, or territorial sea.¹⁰³ Beyond the territorial

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102. Cf. U.S. v. Louisiana, 394 U.S. 11, 89 S. Ct. 773, 22 L.Ed. 2d. 44 (1969). On the threefold allocation of the sea, see generally, C.H.M. Waldock, "International Law and the New Maritime Claims", 1 International Relations (1956), p.163; France de Hartingh, Les conceptions sovietiques du droit de la mer (Paris: Librairie Generale de droit et de jurisprudence, 1960), pp. 10, 60-65, 109; L.J. Bouchez, The Regime of Bays in International Law (Leyden: A.W. Sijthoff, 1964), pp. 4-5; idem, "Some Reflections on the Present and Future Law of the Sea", in Maarten Bos (ed), The Present State of International Law and Other Essays (The Netherlands: Kluwer, 1973), pp. 143-81; A. Shalowitz, Shore and Sea Boundaries (Washington, 1962), Vol. 1, pp. 22-24; M.P. Strohl, The International Law of Bays (The Hague: Martinus Nijhoff, 1963), pp. 3-4; P.W. Birnie "The Law of the Sea Before and After UNCLOS I and UNCLOS II", in R.P. Barston and Patricia Birnie (ed) The Maritime Dimension (London: George Allen & Unwin, 1980), pp. 8-26.
103. Waters within the baseline of the territorial sea are considered internal waters. Draft Art. 26 of the ILC, Official Records of the General Assembly, 11th Session, Suppl. No. 9 (A/3159), p.7. D.P. O'Connell, "The Juridical Nature of the Territorial Sea", 45 BYIL (1971), pp. 303-83. Cf. C. John Colombos, "The Distinction Between Territorial and Internal Waters", in Symbolae Verzijl (La Hague: Martinus Nijhoff, 1958), p.118.



sea are the high seas. The North Atlantic Coast Fisheries¹⁰⁴ and the Gulf of Fonseca¹⁰⁵ Arbitrations (insofar as they related to bays) and the Anglo-Norwegian Fisheries¹⁰⁶ and Icelandic Fisheries¹⁰⁷ Cases involved decisions on the allocation of the sea areas and their delimitations.

The Draft Convention on the Law of the Sea formulates, in very general terms, important legal principles and rules applicable to determine both the extent of maritime and submarine zones to which a state may legitimately lay claim¹⁰⁸ and the manner in which the seaward boundaries of those zones are to be determined, which will be examined in detail in subsequent chapters in the light of this historical analysis.

104. 1910 Award in Scott (ed), The Hague Court Reports, 1916, p.141. See below Ch. 5.

105. 11 AJIL (1917), p.674. See below, Ch. 5.

106. ICJ Reports, 1951, p.116. See below, 3.2.

107. ICJ Reports, 1974, p.3. See below, Ch. 5.

108. Arts. 74 and 83 of the Draft Convention on the Law of the Sea, UN Doc. A/CONF.62/L.78 (28 August 1981). At present a trend towards the 12-mile limit of the territorial waters, 24-mile of the contiguous zone and 200-mile exclusive economic zone is almost universally evidenced. See Legislation on Coastal State Requirements for Foreign Fishing, Legislative Study No. 21 (Rome: Food and Agriculture Organisation of the United Nations, 1981), Table A, pp. 328-33.

3.2 Delimitation and Demarcation

Boundary terminology is not entirely standardised in use, and many writers use the terms "delimitation" and "demarcation" as synonyms - which, in the purely verbal sense, they indeed are. Nevertheless, it is convenient to use two separate terms to refer to two distinct stages in the establishment of a boundary.

Paul de Lapradelle, writing in 1928, distinguishes between self-imposed limitation of domain as a voluntary act of the Roman Empire and delimitation of territory by mutual agreement between two sovereignties. He said:

Delimitation is a Carolingian institution. It was born, in a transition period, between Latin unity and feudal distribution, by the introduction of the Germanic principle of Frankish partition into the surviving framework of the Roman Universitas.¹⁰⁹

In 1896 Sir A. Henry McMahon first drew the distinction between "delimitation" and "demarcation":

Delimitation I have taken to comprise the determination of a boundary line by treaty or otherwise, and its definition in written, verbal terms; 'Demarcation' to comprise the actual laying down of a boundary line on the ground, and its definition by boundary pillars or other similar physical means.¹¹⁰

These definitions were accepted by Lord Curzon in his Romanes Lecture on Frontiers at Oxford in 1907. He defined the terms as follows:

109. Lapradelle, op. cit., pp. 25-6.

110. Colonel Sir A. Henry McMahon first made use of these definitions in a lecture given to a military institute at Woolwich about 1897. See 24 Minutes of Proceedings of the Royal Artillery Institution (1897), p.224; Idem, "International Boundary", 84 Journal of the Royal Society of Arts (1935), p.4.

'Delimitation' means the choice of a boundary site and its definition in a treaty or other formal documents. It is a more precise step than the general allocation of territory which preceded it, but less precise than the demarcation which usually follows ... 'Demarcation' is used only¹¹¹ for the marking of the boundary on the ground.

Thus, by their very nature, delimitation and demarcation are operations of completely different character, though the latter complements and stabilises the former. They will not normally be performed by the same personnel, but the demarcation commission may, and usually should, be given limited powers of delimitation, by having authority to make minor alterations of the paper boundary to suit local conditions. Delimitation is normally a diplomatic procedure, the work of treaty-makers, who should decide, on trustworthy evidence, the boundary that will be acceptable to both high contracting parties. Demarcation is a field operation; its purpose is to mark the boundary on the ground for all to see. It is the crux of all boundary making. As Holdich rightly puts it:

It is in this process that disputes usually arise, and weak elements in the treaties or agreements are apt to be discovered. Important features are found in unexpected positions, and a thousand points of local importance crop up which could never have been taken into account by the delimitators, whose¹¹² definitions leave them unconsidered and unadjusted.

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111. Lord Curzon of Kedleston, Frontiers, The Romanes Lecture (Oxford: Clarendon Press, 1907), p.51.
112. T.H. Holdich, Political Frontiers and Boundary Making (London: Macmillan, 1916), p.179.

In short, it is now generally agreed that delimitation is the process of defining a boundary on maps and in diplomatic documents, demarcation is that of marking it out on the ground. In other words, delimitation means the choice of a boundary site and its definition in a treaty or agreement; demarcation is the actual tracing of the boundary by a commission after the coming into force of the treaty.¹¹³ This was illustrated by an Advisory Opinion delivered by the PCIJ concerning the Jaworzina Boundary in 1923:

... the word aborsement (marking out) used by the Conference of Ambassadors has not always, in fact, nor necessarily, the narrow technical meaning which the Czechoslovak Government desires to give it. The process of marking out does not merely consist of the actual placing of posts and stones which are to indicate the line separating two neighbouring countries; the expression must be held to include all operations on the ground ... For marking out must always be preceded by the fixing of the line.¹¹⁴

A similar approach, formulated in slightly different terms, was made by the Arbitral Tribunal in the Argentine-Chile Frontier Arbitration.¹¹⁵ The Tribunal tended to interpret the words 'delimitation' and 'demarcation' in accordance with the respective definitions given above.

In a good number of boundary treaties the legal distinction between 'delimitation' and 'demarcation' is

113. Menon, *op. cit.*, 27 ICLQ (1978), p.742.

114. PCIJ Ser. B/8, p.47 [*italics added*]. See above, 3.1.1.

115. [1902] IX RIAA, p.35.

not always observed; for example, in Article 3 of the Franco-Siamese Treaty of 13 February 1904 delimiting the frontier in the region of Preah Vihear it was provided that 'delimitation of the frontier should be carried out by a Mixed Commission under Article 1 and 2'.¹¹⁶ As the task of the Franco-Siamese Delimitation Commission was to establish the practical location of a boundary line, to survey on the ground and subsequently to map this is, in fact, a process of 'demarcation' rather than 'delimitation': therefore it might be more properly perhaps termed 'demarcation'.

It is significant to note that in the Temple of Preah Vihear Case the Mixed Commission set up to delimit the watershed boundary in the Preah Vihear region under Articles 1 and 2 of the Franco-Siamese Treaty of 1904, did not find 'demarcation' (or marking the boundary on the ground) called for. With regard to 'delimitation' and 'demarcation', the Court stated that:

There are boundary treaties which do no more than refer to a watershed line, or to a crest line, and which make no provision for any delimitation in addition.¹¹⁷

116. Case Concerning the Temple of Preah Vihear, ICJ Reports, 1962, p.16. See below, Chs. 2, 4.

117. ICJ Reports, 1962, p.34. For discussion, see D.H.N. Johnson, "The Case Concerning the Temple of Preah Vihear", 11 ICLQ (1962). p.1183; Cedric Thornberry, "The Temple of Preah Vihear (Cambodia v. Thailand)", 26 Modern L.R. (1963), p.448; K.K. Roa, The Preah Vihear Case and the Sino-Indian Boundary Question, The Sino-Indian Boundary Question and International Law, No. 1 (The Indian Society of International Law, 1963); See below, Chs. 2, 4.

It must be pointed out that, the Court went on to refer to the provisions in the Treaty of 1904 regarding delimitation and the mapping of the frontier. The Court said that these provisions were made because France and Siam 'regarded a watershed indication as insufficient by itself to achieve certainty and finality. It is precisely to achieve this that delimitations and map lines are resorted to'.¹¹⁸

However, it must be understood that 'delimitation' is not to be read as 'demarcation' in this context: the two are different. All that was required at the most for the purposes of delimitation was to fix the co-ordinates of the points through which the watershed passes.¹¹⁹

Where lines are actually marked out on the ground by the parties to the transaction and at the time of the transaction and are called for by the deed, the lines so marked most clearly show the intentions of the parties and

118. ICJ Reports, 1962, p.34. See below, Chs. 2, 4.

119. In his dissenting opinion, Judge Sir Percy Spender said: 'No question of demarking the northern frontier ever arose and ... that frontier has never been demarked during the fifty odd intervening years. It remains much the same today as it was then. The Mixed Commission appears to have decided to fix the points of the extremities of the northern frontier on the west and on the east and to have agreed that between those two points the frontier need no further delimitation other than the Treaty itself provided. Ibid., p.101, at p.117.

are presumed paramount to other considerations¹²⁰ (clearly expressed contrary intentions etc. being excepted). Was Fawcett right to reckon that:

The demarcation of territory on the surface of the earth does not present any great physical difficulties. Whether lines are to be drawn on land or on water, the combination of normally permanent physical features, as reference points, with accurate methods of surveying¹²¹ and measurement can yield clear and firm results.

In a number of cases, parties have found on occasions that a particular locality as described in the treaty did not exist at all. This was the case, for instance, in the controversy which arose between Great Britain and the United States in connection with the Treaty of 1783 which referred to a range of highlands south of the St. Croix River as the dividing line between two systems of rivers. In fact no such range of highlands existed; nor was it shown on the map used by the negotiators. A dispute also arose as to the identity of the St. Croix River. The dispute was settled by arbitration in 1798.¹²²

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120. In the Island of Timor Arbitration [1914] 9 AJIL (1915), p.240, the arbitrator declared that Art. 3, No. 10 of the 1904 convention concerning the boundary of Dutch and Portuguese possessions in the Island of Timor, ought to be interpreted in conformity with the conclusions of the Netherlands for the boundary; and that a reproduction of the surveillant map signed by the arbitrator was appended as annex VII to the present award of which it should be an integral part. See below, 4.1.
121. J.E.S. Fawcett, International Law and the Uses of Outer Space (Manchester U.P., 1968), p.18 [*italics added*].
122. The St. Croix River Case, J.B. Moore, International Adjudications, Ancient and Modern (1929-30), Vol. II, p.373. Cf. A.F.N. Poole, "The Boundaries of Canada", 42 Canadian Bar Review (1964), pp. 100-139.

Demarcation of sea-bed boundaries, particularly their outer limits, is likely also to be made in the absence of precise information, or on the basis of information which subsequently proves to have been misleading or wrong.

The Anglo-French Continental Shelf Arbitration¹²³ which is discussed in detail elsewhere in this work, raised interesting questions in this respect.

The decision of the Supreme Court of the United States, in United States v. Texas,¹²⁴ is another example of a rectification of a geographical description¹²⁵ used in a treaty of 1819 between the United States and Spain.

123. Anglo-French Continental Shelf Arbitration, Miscellaneous No. 15 (1978), Cmd. 7438; 54 ILR (1979), p.6. See below, Chs. 4, 5, 6.

124. (1896) 162 U.S. I, 37-42.

125. Where the parties to a binding agreement purport to carry it into effect by a document which is not in accordance with the agreement, that document can be rectified. This principle of rectification can apply to vary boundaries of land defined by a conveyance, if they do not accord with what the parties agreed in their prior contract. Craddock Brothers Ltd. v. Hunt [1923] 2 Ch. 136. American cases of rectification, such as Les Wilson & Co., v. United States, 245 U.S. 24; Jeems Fishing and Hunting Club v. United States, 260 U.S. 561. The original boundaries of lakes were grossly and probably fraudulently in error; in the first case, Moon Lake as it originally meandered consisted of 835 acres, yet investigation on the ground showed that it was impossible for a lake to have existed at the time of the original survey; in the latter case the original surveyors falsely ran a portion of the meander line so as to omit 230 acres of dry land. Under such circumstances the meander line and not the lake was held to be the true boundary of the upland owner. The remaining land, that lying between the false meander line and the lake, belonged to the United States as undisposed public lands.

It is noteworthy that in the Beagle Channel Arbitration (Argentina-Chile)¹²⁶ Argentina contended that when a boundary treaty provides for a demarcation on the ground it cannot be regarded as final and conclusive until the demarcation has been carried out.¹²⁷ Since the 1881 Boundary Treaty (Tratado de Limites) makes no provision for any demarcation of the boundary in the Beagle Channel region, Argentina therefore argued that there is 'no subsequent conduct of the Parties, including acts of jurisdiction, can have any probative value'.¹²⁸ The Tribunal however, did not agree with this view. It held that:

The purpose of such procedures [for demarcation on the ground] is not to delay the allocation of sovereign rights over territories, which it is the very object of a boundary treaty to determine, but simply to make adjustment of such particular lines as may not be sufficiently clear from the necessarily general terms of the Treaty - that is ... lines which can be adjusted in the light of purely local conditions without affecting the principles on the basis of which they were adopted. True, this may effect the application of the terms of the Treaty within an already allocated area, but this is a far cry from concluding that the Treaty itself is inoperative for as long as delays, tardiness or other circumstances hold up the demarcations, and that in the meantime it creates no capacity, for either Party to act¹²⁹ within the area it considers allocated to it.

126. [1977] 52 ILR (1979), p.97. Cf. Chilean-Argentine Relations: The Beagle Channel Controversy. A Cartographical Selection (Geneve 1979). For discussion, see Malcolm Shaw, "The Beagle Channel Arbitration Award", 6 International Relations (1978), p.415.

127. The Beagle Channel Award, para. 78.

128. Ibid., para. 169(a) and (b).

129. Ibid., para. 169(b). See below, Ch. 2. Cf. D.H.N. Johnson, "The Conclusions of International Conferences", 35 BYIL (1959), p.1.

It is useful at this point to refer to the following statement made by Professor Brownlie:

First, the notion of demarcation is sometimes applied too readily. Thus a source, for example a map, may classify an alignment as 'demarcated' when in fact the proportion of pillars to the length of the boundary is very small or a proportion of pillars, numerous or not when emplaced, has been removed or become unidentifiable. Secondly, when an international agreement specifies that the alignment follow a specific natural feature such as watershed, then the process of survey and mapping of the watershed line is technically demarcation, even if no markers are placed on the ground.¹³⁰

The word 'demarcation' is regularly used to mean the actual laying down of boundary lines on the ground, and its definition by boundary pillars or other physical means.

'Delimitation' is the proper word to indicate agreed lines on the sea.¹³¹ Thus in the First United Nations Conference on the Law of the Sea, the U.S. proposal stated that:

130. Brownlie, op. cit., p. 4 [italics added].

131. U.N. Doc. A/CONF.13/C.1/L.116, 1 April 1958; United States of America proposal, Article 2, para. 4. See UNCLOS, Official Records, Vol. III: First Committee (Territorial Sea and Contiguous Zone), Summary Records of Meetings and Annexes (A/CONF.13/39), p.243. Cf. S.W. Boggs, "Delimitation of Seaward Areas Under National Jurisdiction", 45 AJIL (1951), p.242. However, during the Senate Committee hearings on the Submerged Lands Act, Mr. Madden, the Assistant Attorney General of Louisiana, said: 'I believe it was first the Secretary of Commerce, or the Treasury, to fix a line to show the demarcation between inland waters and the high seas'. Hearings on S.155 and other bills before the Senate Committee on Interior and Insular Affairs, 81st Cong., 1st Sess., (1949), pp. 179-80, 194; Hearings on H.R. 5991 and H.R. 5992 before Sub-Committee No. 1 of the House Committee on the Judiciary, 81st Cong., 1st Sess., (1949), pp. 74-75. Cf. U.S. v. Louisiana, 394 U.S. 11, 89 S. Ct. 773, 22 L. Ed. 2d. 44 (1969).

The word 'demarcation' is now generally accepted to mean '... the actual laying down of boundary lines on the ground, and its definition by boundary pillars or other physical means'.¹³²

In the Anglo-Norwegian Fisheries Case, the ICJ declared that 'the delimitation of sea areas has always an international aspect', 'although it is true that the act of delimitation is necessarily a unilateral act, because only the coastal state is competent to undertake it, the validity of the delimitation with regard to other states depends upon international law'.¹³³

For instance, this was also the case in the North Sea Continental Shelf Cases. On 2 February 1967, the Federal Republic of Germany (FRG), Denmark and the Netherlands signed two Special Agreements for the submission to the ICJ of the question:

What principles and rules of international law are applicable to the delimitations as between the parties of the areas of the continental shelf in the North Sea ...?¹³⁴

The three Governments further agreed to ask the Court to join the two cases and that they would delimit the continental shelf in the North Sea between their countries by agreement

132. United States of America proposal (article 12), U.N. Doc. A/CONF.13/C.1/L.116. UNCLOS, Official Records, Vol. III: First Committee (Territorial Sea and Contiguous Zone), Summary Records of Meetings and Annexes (A/CONF.13/39), p.243.

133. ICJ Reports, 1951, p.132 [*italics added*]. See above, 3.1.2.

134. Art. 1(1).

in pursuance of the decision requested by the Court. Thus, the Court was not asked actually to establish the boundaries between the parties but, rather, to provide them with legal guidelines for the delimitation.

In substance, the case of Denmark and the Netherlands was that delimitation was to be governed by the principles and rules of international law which are expressed in Article 6(2) of the 1958 Geneva Convention on the Continental Shelf. The Federal Republic, on the other hand, contended that the delimitation of the continental shelf between the parties in the North Sea is governed by the principle that each coastal state is entitled to a just and equitable share based on criteria relevant to the particular geographical situation in the North Sea; that the equidistance method in Article 6(2) of the Convention cannot, in this case, be used for the delimitation of the continental shelf unless it is established by agreement, arbitration, or otherwise; and that it will achieve a just and equitable apportionment of the continental shelf among the states concerned. The Court took the view that there are two concepts of delimitation: either by mutual agreement or in accordance with equitable principles.¹³⁵

Having regard to the language of the Special Agreements and to more general consideration of law regarding the regime of the continental shelf, the task of the ICJ was neither the

135. ICJ Reports, 1969, p.33.

apportionment of the regime areas concerned, nor their division into converging sections, but rather delimitation. The Court defined what it understood by the term 'delimitation'.

It said:

Delimitation is a process which involves establishing the boundaries of an area already, in principle, appertaining to the coastal State and not the determination de novo of such an area. Delimitation in an equitable manner is one thing, but not the same thing as awarding a just and equitable share of a previously undelimited area, even though in a number of cases the results may be comparable, or even identical.¹³⁶

The Court went on to say that 'the process of delimitation is essentially one of drawing a boundary line between areas which already appertain to one or other of the States affected'.¹³⁷ In giving judgment in a case involving the principles of demarcation of a continental shelf as between two coastal states, the Court emphasised most importantly that delimitation must be the object of agreement between the states concerned and that such agreement must be arrived at in accordance with equitable principles (i.e. when one party is not a party to the Geneva Convention).

Jones proposed seven main methods of demarcation, namely, complete definition, complete definition with power

136. Ibid., p.22, para. 18.

137. Ibid. In the Anglo-French Continental Shelf Arbitration 54 ILR (1979), p.6, both disputants were parties to the convention.

to deviate, identification of major turning points, identification of courses and distances, zoning, identification of natural features and definition in principle.¹³⁸ He also uses the term 'definition' for the verbal description of the boundary in the instrument of delimitation, and 'description' for the detailed description of the boundary in the final report of the demarcation commission. It will also be necessary to adopt this terminology.

3.3 Administration

The administration of territory is an element of the traditional modes of occupation, prescription and conquest; it is a precondition for the operation of the process of recognition or acquiescence, and is an important element of 'the continuous and peaceful display of territorial sovereignty',¹³⁹ and the concept of consolidation.¹⁴⁰

138. Jones, op. cit., p.58; idem, 'The Description of International Boundaries', 33 Annals of the Association of the American Geographers (1943), p.102.

139. Island of Palmas Arbitration, II RIAA, p.829.

140. The essence of 'consolidation by historic titles' is that title to territory rests upon a complex of interests and relations which in themselves have the effect of attaching a territory or an expanse of sea to a given state. It is, in effect, the 'organic' link between state and territory which constitutes title. For discussion, see Charles de Visscher, Theory and Reality in Public International Law, English trans. by P.E. Corbett (Princeton U.P., 1968), pp. 24-28; Georg Schwarzenberger, "The Fundamental Principles of International Law", 87 Recueil des Cours (1955-I), Ch. VIII, p.358; idem, "Title to Territory: Response to A Challenge", 51 AJIL (1957), pp. 310-11; Yehuda Z. Blum, Historic Titles in International Law (The Hague: Martinus Nijhoff, 1965), pp. 336-37; E.D. Brown, The Legal Regime of Hydrospace (London: Stevens & Sons, 1971), pp. 84-85. See below, Ch. 2.

Taking possession of a territory, the new possessor must establish some kind of "administration" thereon to show that the territory is actually governed by the new possessor. If within a reasonable time after the acts of taking possession, the possessor does not establish some responsible authority which exercises governing functions, there is then no effective occupation, since in fact no sovereignty is exercised by any state over the territory.¹⁴¹

Administration is the last stage in the boundary-making process. It is the exercise of jurisdiction and in effect governs the territory. 'Adequate administration' means that the occupation must have elements of stability and permanence, and not be merely temporary, and that the form and means of administration must be effective, given the nature of the territory.¹⁴² This last qualification is important, for obviously the same standard and machinery of administration is not required for sparsely inhabited or

141. In The Fama (1804) 5 C. Robinson 115, Lord Stowell held that 'where a title is meant to be established for the first time, some act of possession is usually done'. In the Guiana Boundary Arbitration [1904] XI RIAA, p.11, the Tribunal stated that the occupation cannot be held to be carried out except by effective, uninterrupted, and permanent possession being taken in the name of the state, and that a simple affirmation of rights of sovereignty or a manifest intention to render the occupation effective cannot suffice.

142. J.E.S. Fawcett, The Law of Nations, 2nd ed., (Middlesex, England: Penguin, 1971), p.67.

uninhabited regions, such as Greenland,¹⁴³ Antarctica¹⁴⁴ or the U.K. island of Rockall.¹⁴⁵

The degree of state activity required to establish title would depend upon the character of the territory. Accordingly, the manifestation of sovereignty over a small and distant

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143. The area of Greenland is titally 2,175,600 square kilometres. 5/6 of this area is covered by permanent 'inland ice', and parts only of the western coast had been settled. In the case of Eastern Greenland where the Court pointed out in many cases that international tribunals have been satisfied with very little in the way of actual exercise of sovereign rights provided that the opponent could not make out a superior title. PCIJ Ser. A/B, No. 53, p.22. Cf. Isi Foighel, "Home Rule in Greenland 1979", 48 Nordisk Tidsskrift for International Ret (1979), p.4; the Greenland Home Rule Act, Act No. 577 (29 November 1978), ibid., p.10. In the Clipperton Island Arbitration, where the island was uninhabited, physical and continuing occupation was not required as a condition of possession. II RIAA, p.1108.
144. In Antarctica Cases where the United Kingdom claimed to have a title by reason of historic discoveries followed by a long-standing and peaceful display of sovereignty, e.g., the issue of Royal Letters Patent which made provisions for the government of these territories and passing the whaling and sealing laws. ICJ Reports, 1956, pp. 12, 15; the Antarctic Treaty, 41 Department of State Bulletin No. 1069, December 21, 1959, p.911; see also Cmnd. 913, Miscellaneous No. 21 (1959). Cf. the 1980 Convention on the Conservation of Antarctic Marine Living Resources, 19 ILM (1980), p.837; Antarctic Treaty Consultative Meeting: Recommendations Adopted at the Eleventh Meeting, 20 ILM (1981), pp. 1265-70. See below, Ch. 5.
145. The Island of Rockall was formally taken in the name of Her Majesty on 18 September 1955 in pursuance of a Royal Warrant dated 14 September 1955 addressed to the Captain of Her Majesty's Ship Vidal. In 1972, the Island of Rockall Act was pronounced and Rockall is incorporated into the United Kingdom as part of the County of Inverness. See The Island of Rockall Act 1972 (C.2). See below, Ch. 3.

island, sparsely inhabited or uninhabited, cannot be expected to be frequent. Just as the Arctic and inaccessible regions of Eastern Greenland demanded relatively little evidence of effective administration to establish title, so also does the title to small islands.¹⁴⁶

There is no doubt that in certain circumstances a right of sovereignty may be recognised in the absence of actual administration of territory. A state does not and cannot manifest governmental functions over every part of its territory in equal measure - or, in some parts, at all. It has always been accepted that the sovereignty of the state extends to uninhabited and uncultivated lands within its borders. If such territories are on, as distinct from within, its perimeter, then it is probable that sovereignty depends upon recognition by neighbouring states and the existence of a boundary delimited by custom or treaty. That is, a unilateral claim to sovereignty unaccompanied by the exercise of governmental functions over an area disproportionate to the area under de facto settlement and administration may be treated as ineffective in international law. Policy may, however, lead to its recognition. It may, moreover, be accepted that the 'natural boundaries' of

146. If a state lands an army and sets up a complete settlement and administration on a small island, the act of sovereignty creates title tout d'un coup, since the power disposed by the occupying authority suffices for exclusiveness. See D.P. O'Connell "International Law and Boundary Disputes", 54 Proceedings, ASIL (1960), p.77, at pp. 83-84. Cf. The Clipperton Island Arbitration, II RIAA, p.1108.

territory claimed may set the limits to sovereignty irrespective of any manifestations of governmental administration. Since actual administration cannot normally prevail against clear evidence of possession, it is probably only where such evidence of administration is ambivalent or absent that other criteria have decisive weight. Take, for example, the Isles of Aves Arbitration (Netherlands-Venezuela).¹⁴⁷ This dispute between the Netherlands and Venezuela related to sovereignty over the Island of Aves and was referred to the Queen of Spain, who acted as sole arbitrator under the compromis of 1857.¹⁴⁸ As the Netherlands had done nothing except utilise the fishing on this island through its subjects, while Venezuela had been the first to hold an armed force there and to exercise acts of sovereignty. The arbitrator thus confirmed in 1865 the dominion which Venezuela had acquired through a general title derived from Spain. Fishing for turtles and gathering eggs in the island

147. 1865. Award in Moore, International Arbitrations, Vol. 5, p.5037; La Fontaine, Pasicrisie internationale (Berne, 1902), p.152; A. de Lapradelle et N. Politis, Recueil des arbitrages internationaux, Deuxieme ed. Tome II (Paris: Les Editions Internationales, 1957), p.404; J.H. Ralston, The Law and Procedure of International Tribunals, Rev. ed. (Stanford U.P., 1926), p.315.

148. Art. 1 of the 1857 Caracas Convention provides: "La question du droit de domination et de souverainete de l'île Aves sera soumise a l'arbitrage d'une puissance amie, prealablement choisie d'un commun accord."

was held as not supporting sovereignty but only signifying a temporary and precarious occupation of the island without being an exclusive right.¹⁴⁹ The island was therefore awarded to Venezuela, who had to pay an indemnity to the Netherlands for the loss of the fishing rights of its subjects.

In the Eastern Greenland Case,¹⁵⁰ it seems the PCIJ was very much influenced by the two awards on sovereignty over islands, the Island of Palmas¹⁵¹ and the Clipperton Island¹⁵² Arbitrations. One of the difficulties of the PCIJ's decision was whether concepts drawn from two awards relating to relatively small islands were applicable in all aspects to a big island. The PCIJ's discussion of the evidence for the Danish 'intention and will to act as sovereign', and 'actual exercise or display of such authority',¹⁵³

149. On the question of the visits of Jersey fishermen to the island in the Minquiers and Ecrehos Case, France, in fact, after 1839 allowed British fishermen to go peacefully to the disputed islets. U.K. however, has never allowed the French to frequent these islets. ICJ Reports, 1953, pp. 57-59. Professor O'Connell thus rightly observed that 'mere exploitation by fishermen unaccompanied by legislative and executive action designed to render their exploitation nationally exclusive cannot found title'. D.P. O'Connell, International Law, 2nd ed., Vol. I (London: Stevens & Sons, 1970), p.418.

150. PCIJ Ser. A/B, No. 53, p.22.

151. [1928] II RIAA, p.829.

152. [1931] II RIAA, p.1105.

153. The Danish assertion that the Norwegian 'occupation' was invalid rested upon three bases: (1) that Denmark had enjoyed and had peacefully and continuously exercised an uncontested sovereignty over Greenland for a long time; (2) that Norway had recognised Danish sovereignty over the whole of Greenland; (3) that Norway was estopped by quid pro quo, a promise (the Ihlen Declaration) given by the Norwegian foreign minister in 1919 to desert from occupying any territory in Greenland. PCIJ Ser. A/B, No. 53, p.44. See below, Ch. 4.

show a lack of consideration of the relative scale of the disproportion between the size of the landmass and the exiguous display of authority.

In the Minquiers and Ecrehos Case, the Court considered the contentions of both parties that they possessed an ancient or original title to the islands but concluded:

What is of decisive importance ... is the evidence which relates directly to the possession of the Ecrehos and Minquiers groups.¹⁵⁴

Having regard to the special character of these semi-habitable islets, France argued that she had performed effective acts of sovereignty. In 1929 a French national, Monsieur Leroux, had been building a hut on Maitresse Ile of the Minquiers.¹⁵⁵

It may be observed that there was apparently no evidence that any administrative action had been taken by France afterwards. In this respect the Court attached 'in particular, probative value to the acts which related to the exercise of jurisdiction and local administration and to legislation'.¹⁵⁶

It found in favour of the United Kingdom on the ground, inter alia, that British authorities during the greater part of

154. ICJ Reports, 1953, p.57.

155. Ibid., pp.71-72. See also Sir Gerald Fitzmaurice, "The Law and Procedure of the ICJ, 1951-54: General Principles and Sources of Law", 30 BYIL (1953), p.46.

156. ICJ Reports, 1953, p.65.

the nineteenth century and in the twentieth century have exercised state functions in relation to both groups of islands.¹⁵⁷

In the Frontier Land Case (Belgium v. The Netherlands), where the disputed plots were described as heath and formed part of a complex system of intermingled enclaves, the ICJ decided, as regards such plots, that acts 'largely of a routine and administrative character' performed by local Netherlands officials did not suffice to establish a boundary line different from the one to be derived from the boundary convention between the two states.¹⁵⁸

In the Rann of Kutch Arbitration, Pakistan stressed that the starting point in any process of consolidation is 'actual possession, actual control, physical exercise of sovereignty. Without that, the process does not begin'. In support of this proposition, Pakistan quoted a passage from Professor Jennings to the effect that actual effective

157. Ibid., pp. 67, 70. In the oral proceedings, Sir Gerald Fitzmaurice adhered that the United Kingdom is in sole effective possession and invoking an ancient title and a long continuance of this possession; that all the normal manifestations of sovereignty during that period are carried out from the British side, and none from the French. These and many other factors create a virtually irresistible presumption that the islands were British at the earlier dates. ICJ Pleadings, 1953, Pt. II, pp. 94-95.

158. The treaty line had attributed sovereignty over the disputed plots to Belgium. ICJ Reports, 1959, p.209. See below, Ch. 2.

control is necessary both for the creation of a title and its maintenance, and that the process of consolidation cannot begin to operate until actual possession is first accomplished.¹⁵⁹

In addition, it must be added that the administration of territory, though very relevant to title over uninhabited islands, is unnecessary to establish the title to submarine areas, not only because submarine areas differ by nature from the land territory, but also because 'the submarine areas concerned may be deemed to be actually part of the territory over which the coastal state already has dominion' - in the sense that, although covered by water, they are a 'prolongation', 'continuation' or 'extension' of a state's land territory.¹⁶⁰ The important considerations here are not dissimilar in relation to submarine areas to those applied in terra nullius or uninhabited land territory. Actual administration of submarine areas is somewhat fictional. Actual exploitation of natural resources is probably the most decisive consideration.¹⁶¹

159. 50 ILR (1976), pp. 105, 385. Cf. R.Y. Jennings, The Acquisition of Territory in International Law (Manchester U.P., 1967), p.26. See below, Ch. 2.

160. The North Sea Continental Shelf Cases, ICJ Reports, 1969, p.31, para. 43. Cf. Art. 2(3) of the 1958 Geneva Convention on the Continental Shelf; the Aegean Sea Continental Shelf Case, ICJ Reports, 1978, p.36, para. 86; See below, Chs. 6 and 7.

161. In the North Sea Continental Shelf Cases indeed the ICJ referred to existence of deposits of resources as a factor to take into consideration in delimiting the boundaries between the three states concerned and it appears from the subsequent agreements giving effect to the decision in that case that the parties did take into consideration Denmark's existing exploitation in part of the area. These points are more fully discussed in subsequent chapters.

4. Classification of Boundaries

In this section we may include the boundaries of mandated and trusteeship territories, leased territories and territories under military occupation. Maritime boundaries other than the boundaries of the territorial sea form a further category: the boundaries of the 'continuous zone', fishing zones, conservation zones, or pollution zones. The boundaries of the 'continental shelf' and exclusive economic zone, strictly speaking, delimit the space in which certain 'sovereign rights' may be exercised. Agreements for collective and regional defence delimit areas for military purposes, and may coincide with the boundaries of political 'sphere of influence' or 'interest'. Economic boundaries to 'free trade areas', etc. although they will normally coincide with the political boundaries of state sovereignty, on occasion do not, and in either case they are legally distinct.

Indeed, it may be argued that some of the confusion which has surrounded issues relating to the lawful and unlawful use of force by states stems from the confusion or assimilation of boundaries of differing legal functions. For the definition of concepts such as 'aggression', 'intervention' and 'self-defence' and the elaboration of the concept of 'territorial integrity' for the purposes of Article 2(4) of the United Nations Charter, together with the scope of the powers of regional organisations under Chapter VIII of the Charter, all require some clear

conception of the boundaries within which the transgression or defence takes place.

Before attempting a legal classification of boundaries, however, it will be advantageous to examine the classifications of boundaries offered by geographers, strategists and political scientists, for it may well be that these classifications also have some legal significance. For this purpose, it is suggested that such classifications¹⁶² be divided into three categories.

4.1 Natural Classifications

Natural boundaries are considered to be determined by geomorphological characteristics. They are thus morphological boundaries. This classification raises two problems: First, what is a 'natural' boundary? Secondly, are any 'natural boundaries' recognised by international law?

In the usual sense, a 'natural' boundary is defined by some prominent physical feature of the earth's surface, such as the sea, a mountain range, a desert, a great river, a trough, a valley and a canyon. There are distinct uses of natural boundaries in an effort to avoid territorial disputes. First, a natural feature, such as a river, may be taken as the traditional custom line dividing two states. Second, the

162. The oldest classification of boundaries, for example, is into 'natural' and 'artificial' boundaries. Boggs, op. cit., p.22.

natural feature, for instance a watershed line, may be taken in a treaty or custom as the embodiment of the agreed line of division. Third, the feature may be thought to be 'the natural place for a boundary', as in the case of the mountain range dividing Timor Island in two.¹⁶³

Four types of 'natural boundary' have been distinguished, namely, naturally-marked boundaries, natural defence boundaries, natural barriers to trade, and natural communication divides,¹⁶⁴ which are differentiated further as to degrees of hindrance.

It may also be remarked that, on examination, natural boundaries will rarely constitute 'boundaries' according to the terminology adopted here. Rather they will take the form of 'frontier zones': lakes, rivers, sea, desert, swamps, forest, mountain ranges and similar physical features such as troughs, valleys and canyons.

The establishment of a 'natural frontier' will therefore not ipso facto establish a precise boundary line. This is because natural boundaries are in themselves never complete defences.¹⁶⁵ Even the magnificent and definitive Himalayas

163. See e.g., The Island of Timor Arbitration, II RIAA, p.481. See also 9 AJIL (1915), p.240. See above, 3.2. Cf. Daniel Wilkes, "Territorial Stability and Conflict" in C.E. Black & R.A. Falk (ed), The Future of the International Legal Order, Vol. III (Princeton U.P., 1971), p.168.

164. Richard Hartshorne pointed out three kinds of natural barriers; See Boggs, op. cit., p.25; Cf. Jones, op. cit. p.7.

165. It is widely accepted that India's claim in the western sector of the Sino-Indian frontier is very weak, ignoring as it does the natural frontier of the Karakoram range and seeking to incorporate the Aksai Chin plateau area on the Chinese side. While from the Indian side the Aksai Chin leads nowhere and is extremely difficult to reach, it lies astride a traditional Chinese trade route. See John Gittings, "India and China try to fix their frontier", The Guardian, 10 December 1981, p.7. See above, 2.4 and below, Ch. 2.

did not prevent the British from marching on Lhasa in the almost inaccessible Tibet.¹⁶⁶

It will be recalled that Max Huber, in the Island of Palmas Arbitration, refers to 'so-called natural frontiers as recognised by international law.'¹⁶⁷ It is true that so-called 'natural frontiers' have already been discussed by writers on the law of territory. And yet reference to the manner in which territorial sovereignty or other territorial rights are acquired will suggest that 'natural boundaries' should perhaps be recognised in international law in two senses only. First, where a boundary is established by international agreement, or by a unilateral act, such as occupation, annexation etc., it may be that a 'naturally marked boundary' is selected, such as a river, a mountain range, a trough, a valley, a canyon, or the edge of the continental shelf, to cite some examples. Secondly, where no express act of delimitation has taken place, there may well be a presumption in favour of a particular natural boundary. Thus where a state has taken possession of a part of an island, it may be presumed that it has constructively occupied the whole.

166. Roderich Peattie, Look to the Frontiers (New York, London: Harper Brothers, 1944), p.56.

167. II RIAA, p.829. See above, 3.3.

In the Bulama Island Arbitration (Great Britain v. Portugal), the Island of Bulama was adjacent to the mainland and so near the mainland that cattle could cross at low water; therefore the arbitrator based the award of the disputed territory to Portugal on the Portuguese possession of the mainland and the appurtenance of the island:

Islands in the vicinity of the mainland are regarded as its appendages: ... the ownership and occupation of the mainland includes the adjacent islands, even though no positive acts of ownership may have been exercised over them.¹⁶⁸

In the Minquiers and Ecrehos Case (Britain v. France), relating to disputed British and French claims to certain channel islets, the French Government referred to the principle that the 'land dominates sea'. It argued that the state to which the principal islands belong should also possess sovereignty over the islands whose territorial status is uncertain.¹⁶⁹

A state occupying the mouth of a river may also be presumed constructively to occupy the entire river basin. In The Anna, La Porte,¹⁷⁰ Sir William Scott (Lord Stowell) found that a dependent island formed by accretion, was a natural appendage of the mainland. Ownership of this accretion was resided in the adjoining riparian state. In Secretary of State for India in Council v. Chelikani Rama Rao, the

168. Moore, International Arbitration, Vol. 5, p.1909, at p.1919.

169. ICJ Reports, 1953, p.98.

170. (1805) 5 C. Rob. 373; 2 BILC, 699.

Judicial Committee of the Privy Council had to consider whether islands formed by alluvium¹⁷¹ (land formed as a result of accretion) in the mouth of a river in India were Crown property:

The point is geographically within three miles of British territory; at that point islands have risen from the sea. Are those islands no man's land? The answer is, they are not; they belong in property to the British Crown.¹⁷²

The greatest advance by states in support of their claims to adjacent submarine areas is the principle that, in the words of the Truman Proclamation of 1945, 'the continental shelf may be regarded as an extension of the land-mass and thus naturally appurtenant to it'.¹⁷³ This is not only repeated in numerous proclamations, but was also confirmed by the 1958 Geneva Convention on the Continental Shelf. The result of this is that the right

171. Land formed as a result of accretion is called alluvium (or alluvio). In case of alluvial deposits, the Roman Jurists held that the possessor of the adjoining bank of a river had a proprietary title to them. If an island were formed in the channel of the river, the possessor of the neighbouring bank had a right of property in it; on the other hand, if an island were formed in the mid-channel, it would be the common property of the owners of the two banks. See Dig. I.XL. Tit.I, para. 7; Just. Inst. Lib. II, Tit. I, para. 22. In the Island of Palmas Arbitration II RIAA, p.839 the Arbitrator said that an accretion to a portion of territory where there exists an actual sovereignty capable of extending to a spot which falls within its sphere of activity. See also the Chamizal Boundary Arbitration [1911] XI RIAA, p.309.

172. [1916] 85 LTPC, p.222, at p.224.

173. Proclamation No. 2667, 10 Fed. Reg. 12303; 13 Department of State Bulletin, No. 327, Sept. 30, 1945, p.485. See below, Ch. 5.

of the coastal state over the seabed and subsoil of the submarine areas adjacent to the coast but outside the area of the territorial sea, do not depend on occupation, effective or notional, or on any express proclamation.¹⁷⁴

If the coastal state does not explore its submarine area or exploit its natural resources, no one may undertake these activities, or make claims to that submarine area, without the express consent of the coastal state.¹⁷⁵ The concept of natural appurtenance was also supported by the ICJ in the North Sea Continental Shelf Cases.¹⁷⁶ The Court, in fact, called it 'determinant' and 'fundamental'.¹⁷⁷

The ILC stated in its 1956 report:

Neither is it possible to disregard the geographical phenomenon whatever the term - propinquity, geographical continuity, appurtenance or identity - used to define the relationship between the submarine areas in question and the adjacent non-submerged land.¹⁷⁸

It is important to note that the conception of unity or physical identity of the continental shelf area, as distinguished from mere contiguity, underlies the principal geographical explanations of the phenomenon of the continental shelf. The Truman Proclamation stated that the continental

174. Article 2(3) of the 1958 Geneva Convention on the Continental Shelf.

175. Article 2(2).

176. ICJ Reports, 1969, p.22.

177. Ibid., p.31.

178. II YBILC (1956), p.298. See below, Ch. 6.

shelf resources frequently form a seaward extension of a pool or deposit lying within the territory.¹⁷⁹ The ICJ pointed out in the North Sea Continental Shelf Cases that 'the institution of the continental shelf has arisen out of the recognition of a physical fact; and the link between this fact and the law, without which that institution would never have existed, remains an important element for the application of its legal regime.'¹⁸⁰ The Court, therefore, called the continental shelf an inalienable 'appurtenance' of coastal states and 'natural prolongation or continuation of the land territory or domain'.¹⁸¹

Writers have on occasion sought to show that there are rules of international law laying down certain natural or artificial boundaries, the watershed and the crestline on a mountain boundary; the thalweg¹⁸² or median lines¹⁸³

179. Proclamation No. 2667, 10 Feb. Ref. 12303. 13 Dept. of State Bulletin, No. 327, Sept. 30, 1945. See below, Ch. 5.

180. ICJ Reports, 1969, p.51.

181. Ibid., p.31.

182. 'When a river forms the boundary between two states it is usual to say that the true line of demarcation is the thalweg, a German word meaning literally the "downway"; that is the course taken by boats going down stream, which again is that of the strongest current, the slack current being left for the convenience of ascending boats. Thal in the sense of valley enters into thalweg only indirectly. The immediate origin of the word lies in the use of berg and thal to express the upward and downward directions on a stream, like amont and aval in French.' John Westlake, International Law Pt. I (Cambridge U.P., 1910), p.144 and n.1. The thalweg was held to apply to the Niagara River in Re Village of Fort Erie and Buffalo and Fort Erie Public Bridge Co. [1927] 61 OLR 502; 1 DLR 723 and to the Rainy River by Rainy Lake River Boom Corporation v. Rainy River Lumber Co. [1912] 27 OLR 131; 6 DLR 401. Writers of/

of authority tend to support the proposition that the thalweg is the main navigable channel, though they do not examine the problem which may arise when the deepest channel and the main navigable channel are different. The definition of thalweg seems to fall into two distinct groups: those in which the thalweg is coincided with the navigable channel, as in the definitions suggested by the US Supreme Court in Iowa v. Illinois (1893) 147 US 1; Minnesota v. Wisconsin (1920) 252 US 273; Louisiana v. Mississippi (1906) 202 US 1; New Jersey v. Delaware (1934) 291 US 361 per Cardozo; and those in which the thalweg is referred simple to the major channel as in the Argentine-Chile Frontier Arbitration [1966] XVI RIAA, p.109.

183. In Grisbadarna Arbitration the median line claimed by Norway would have enclosed the Grisbadarna fishing banks within Norwegian territorial waters, and thereby deprive Sweden of a rich fishing ground which had been consistently exploited by Swedish fishermen for longer, and to a greater extent, than by Norwegians. The tribunal rejected the thalweg as the line of boundary. Scott, The Hague Court Reports, p.121. See below, 3.1.2. In the case of the Free Zones of Upper Savoy and the District of Gex, the Court referred to the lake boundary between Switzerland and Sardinia on Lac Lemman as the 'middle line'. PCIJ Ser. A/B, No. 46, p.121. It is instructive to note, in consequence, that the 'median line' rule for the delimitation of non-navigable rivers was incorporated into Art. 6(1) of the 1958 Geneva Convention on the Continental Shelf for the delimitation of the submarine areas between opposite states. See below, Ch. 7.

on a river boundary; the lines of equidistance and median lines on the continental shelf; the maritime boundary line runs along the edge of the territorial sea. The evidence in favour of these alleged rules of international law will be considered in detail in later chapters, but it is appropriate here to anticipate the conclusion that will be reached; alleged rules of customary international law purporting to lay down specific boundaries constitute no more than presumptions of varying validity which are founded on the concept of constructive occupation.

4.1.1 Morphological Boundaries or Frontiers

Naturally marked boundaries have been subjected to excessive classification. The relative merits of different natural features, for this purpose, have often been examined, one kind of boundary being preferred to another by different states. Such discussion, however, has little point, because when such boundaries were adopted, their advantage lay chiefly in the fact that they were obvious and unambiguous. In early times they were not chosen because they were difficult to cross or because they presented a military barrier to invasion; it is only in comparatively modern times that the actual course of a political boundary has come to be a matter of military significance to the state that is enclosed by it. The boundary lines themselves are of only two kinds; those made to conform to conspicuous features of the natural landscape and those defined in geometrical terms, such as parallels, meridians, arcs or circles and

straight lines drawn between turning points. The principle on which a particular line is chosen, whether to separate ethnic or cultural groups or to provide access for a state to resources or facilities, often has little to do with the way in which it is made to conform or not to conform to landscape features. The latter is a morphological classification; the former, a functional one.¹⁸⁴

From the morphological point of view, boundaries may, for convenience, be grouped into those which have been made

- 1) to follow the course of a mountain or hill range;
- 2) to follow the line of rivers, canals and lakes;
- 3) to run through a desert, a forest, or a swamp; or
- 4) to conform with some other physical (geographical/geological) feature that may have been conspicuous in the landscape¹⁸⁵ such as troughs, valleys and canyons.

When alignments are based upon natural features, such as rivers and escarpments, the boundary produced is not truly described either as 'natural' or as 'artificial'. Natural features do not readily provide the precise principle of allocation required. Thus a river line has to be elaborated or constructed in terms of the median line for

184. Norman J.G. Pounds, Political Geography, 2nd ed. (New York: McGraw-Hill, 1972), pp. 83-86.

185. Ibid. Cf. Hills, op. cit., 28 Geographical Journal (1906), p.146; Thomas Holdich, "Geographical Problems in Boundary Making", 47 Geographical Journal (1916) p.421.

a non-navigable river or the thalweg (mid-channel) for a navigable river.¹⁸⁶

In the case of a river with broad flood zones, straight lines between pillars established on the banks and on islands may be substituted for the 'river line'. In other words, natural features may lack sufficient definition. The relatively precise alignment based upon a river or escarpment is ultimately no more and no less than other boundaries.

In areas of dense population or mineral deposits and in tense political situations, boundaries are not truly to be described as 'artificial'. A boundary alignment is no more and no less artificial than any other entity which conveys an idea and which cannot be reduced to some simple, or single, site or physical presence. Examples are the notion of a nation, a linguistic or other 'minority' group, a corporation or a college. In any case, even in the case of an unmarked boundary, the principle of the boundary will be a basis for both action and restraint on the part of governments, administrators and police officials.¹⁸⁷

186. Unless there is a limitation provided by the admission act, the line of division between states bordering on a river is the centre of the main channel of the stream. See e.g., Indiana v. Kentucky 136 US 479; Washington v. Oregon 211 US 127.

187. Brownlie, loc. cit.

4.2 Artificial Classifications

These are purely arbitrary classifications determined without any universal criteria. The main types in this category are: military boundaries, scientific boundaries and organic boundaries.

'Artificial frontiers' or boundaries, are those boundary lines which are not dependent upon natural features of the earth's surface for their selection but have been artificially projected geographic lines: meridians, parallels, highways, walls,¹⁸⁸ canals, roads, neutral zones and geometrical boundaries. No attempt will be made in this work to use the terms 'natural boundaries' and 'artificial boundaries' in the strict or technical sense, and it is therefore not necessary to define them precisely because all boundaries are in fact artificial.¹⁸⁹

This type of classification has, moreover, been criticised, mainly on two grounds: first the ambiguity of the term 'natural boundary' as distinct from 'artificial boundary' - together with the fact that normally a nation's

188. Curzon, op. cit., p.23; C.M. Brown, op. cit., p.59.

189. The Romans of antiquity very often constructed boundary walls, and the Chinese Long Wall (known as the 'Great Wall') may also be cited as an example. For the Antonine Wall, see Hanson and Maxwell, loc. cit.; for Long Wall, see Owen Lattimore, "A Ruined Nestorian City in Inner Mongolia", 84 Geog. Jour. (1934), pp. 493-94; idem, Inner Asian Frontier of China (New York: Amer. Geog. Society, 1940); See above, 2.2.

'natural boundaries' are those to which it desires to expand, and the use of the concept may frequently disguise a territorial claim; and secondly the inherent tendency of this classification to attribute superiority to the 'natural' as against the 'artificial' boundary. Whatever the merits of the classification for non-legal purposes, for our purposes we need only ask whether, and in what sense, 'natural frontiers' or 'natural boundaries' are recognised by international law, and how far they are relevant to delimitation of seabed boundaries.

4.2.1 'Military' Boundaries or Frontiers

A more generalised classification of boundary functions has been given, namely into military and non-military. This distinction conforms roughly with that made by Spykman between boundaries as lines of contrast of power structures and as lines of demarcation between legal systems. Total warfare has diminished the distinction between military and non-military functions, as it has forced the legal system to conform to the demands of the power structure. The ultimate generalisation with regard to boundary functions is the obvious one that an international boundary limits the domain of an absolute sovereignty.¹⁹¹

191. Nicholas John Spykman, "Frontiers, Secretary, and International Organization", 32 Geography Review (1942), p.436, at p.437. Cf. Jones, op. cit., p.12. Economic warfare also encompasses a great range of non-military functions.

4.2.2 'Scientific' Boundaries or Frontiers

In one sense the term 'scientific' frontier or boundary has been used by writers as a synonym for a 'strategic' frontier¹⁹² which is itself a sophisticated development of the 'natural' frontier. Thus, with reference to a mountain frontier, Lord Curzon described the 'scientific frontier' as 'a frontier which unites natural and strategical strength, and by placing both the entrance and the exit of the passes in the hands of the defending Power, compels the enemy to conquer the approach before he can use the passage'.¹⁹³

As Jones remarks, 'obviously, terms like "defending Power" and "enemy" are not used objectively'. His further objection is that 'there can be no "scientific boundaries" in critical borderlands where there are no natural barriers of consequence'. His thesis cannot, however, be entirely accepted.¹⁹⁴ For although the most obvious 'scientific frontiers' may be natural barriers, numerous examples of the establishment of artificial barriers with a strategic purpose may be cited in the form of palisades, mounds,

192. E.g. the Northern Manchuria is strategically an important buffer land. For details see Andre Lobanor-Rostovsky, "The Problem of Strategic Frontiers", Frontiers of the Future (California U.P.: Berkeley and Los Angeles, 1941), p. 91; C.B. Fawcett, Frontiers, Ch. VIII, p.85.

193. Curzon, op. cit., p.19.

194. Jones, op. cit., p.9.

ramparts, walls, barbed wire, minefields and defoliated zones.¹⁹⁵ The Israel capture of the Syrian Golan Heights in 1967 after the Six-Days'-War is an obvious example to reduce the vulnerability of artillery attack.¹⁹⁶

195. Prescott, Political Geography, p.71.

196. In 1948, war broke out between Zionists and Palestinians. Armies of Syria, Lebanon, Jordan, Iraq and Egypt invaded. By the end of the war the new State of Israel controlled an area one-third larger than allotted by UN plans. In 1956, after secret agreement with Britain and France, Israel attacked Egypt and occupied Sinai and Gaza Strip. Later forced by international pressure to withdraw to the 1948 cease-fire lines. The 1967 Six-Days'-War gave Israel control of Syrian Golan Heights, West Bank, Gaza and Sinai peninsula. The truth about the Arab-Israeli conflict is that the refusal of Arab governments other than Egypt to recognise and make peace with Israel necessitates security boundaries for Israel which are far removed from her pre-1967 ones. See generally, Nathan Feinberg, The Arab-Israel Conflict in International Law (Jerusalem: The Magnes Press, 1970); Y.Z. Blum, Secure Boundaries and Middle East Peace (The Hebrew Univ. of Jerusalem, 1971). The question as to whether Israel has or has not purported to annex those occupied areas. If it has, such annexation during a state of war did not, even under the traditional international law, confer sovereignty by military occupation. Article 2(4) of the UN Charter precludes such a title under the contemporary international law because an international illegal act cannot be the basis of title to territory. Neither is self-defence a basis for such a title. This principle is also applicable to non-members as well. Art. 2(6) of the UN Charter. See above, 3.1.1.

Are 'scientific' or 'strategic' frontiers or boundaries recognised by international law in that they may constitute 'natural' frontiers or boundaries? Our answer must be the same as in the case of natural frontiers. It must, however, be added that boundary treaties may make provision implicitly, by say designating a 'natural barrier' to form part of a boundary for the establishment of a 'strategic' frontier. By the ordinary canons of treaty interpretation, therefore, it will be appropriate in case of dispute to have regard to the desire of the parties to establish such a barrier. The Rann of Kutch Arbitration¹⁹⁷ also provides a precedent for taking account of strategic factors under the principle of 'equity'.

Clearly, in so far as detailed 'scientific' procedures of delimitation and demarcation are part of international practice, they may be said to be recognised by international law. A lack of detailed procedures will not, however, render invalid or voidable a boundary which has otherwise been clearly established. On the other hand, it may be said that no boundary exists until it has been clearly demarcated on the ground, and described on maps and, in the report of the demarcation commission, is legally beyond question. Conversely, the principle quieta non movere¹⁹⁸ will lend sanction to a boundary which has been definitively established.

197. 50 ILR (1976), p.2. See below, Ch. 2.

198. A settled state of affairs should not be disturbed.
See below, Ch. 2.

Similarly, in the case of the establishment of a new state, there are precedents for taking explicit account of a strategic factor in delimiting its boundaries. It may also be considered whether there may be implied in the right of 'self-defence' a possible right - if the acquisition of territory or the alteration of boundaries by force or threat of force is in general prohibited by international law - to the adjustment of a boundary to obtain better defence against a neighbour guilty of 'aggression'.¹⁹⁹

After the 1967 Six-Days'-War between Israel and various Arab nations (which resulted in the occupation of Arab territories), what Israel proclaimed as admissible is the attempt to base title to territory on 'conquest'. The Guarantees Clause of the Security Council Resolution 242 Art. 2(c)²⁰⁰ is, however, subordinated to the principle that every state in the area is entitled to live in peace with 'secure and recognised boundaries'. Their territorial inviolability and political independence with such secure and recognised boundaries should be guaranteed. Does the

199. For details, see D.W. Bowett, Self-Defence in International Law (Manchester U.P., 1958); Ian Brownlie, International Law and the Use of Force by States (Oxford: Clarendon Press, 1963); C.H.M. Waldock, "The Regulation of the Use of Force by Individual States in International Law", 81 Recueil des Cours (1952-II), p.455; Garry Feinstein, "Self-Defence and Israel in International Law: A Reappraisal", 11 Israel L.R. (1976), p.516.

200. UN Doc. S/Res. 242 (1967).

phrase 'recognised boundaries' refer to boundaries, including Jordanian and Egyptian as well as Israeli boundaries which are still to be fixed, and then recognised? Can it possibly refer to certain lines drawn by the Armistice Agreements of 1949, even though they were then explicitly stated not to constitute political boundaries? The preambulatory restatement in Resolution 242 of the 'inadmissibility of acquisition of territory by war' might be a reassertion of accepted principle ex injuria jus non oritur.²⁰¹

201. An unlawful act cannot normally produce results beneficial to the law-breaker. As the illegal act is merely a causa sine quo non it does not itself produce legal consequences. Other maxims expressing the same idea are nemo ex suo delicto meliorem suam conditionem facere potest and nullus commodum capere potest de sua propria injurie. This concept logically followed by the outlawry in the doctrine of war and the use of force. See Art. 2(4) of the UN Charter and Arts. 52 and 53 of the Vienna Convention on the Law of Treaties of 1969. Cf. Fisheries Jurisdiction Case (U.K. v. Iceland), ICJ Reports, 1973, p.47, per Judge Padilla Nervo. See also Fisheries Jurisdiction Case (F.R.G. v. Iceland), ibid., p.91. In the law relating to acquisition of territorial sovereignty, illegal activity may produce valid results by the operation of prescription, acquiescence and estoppel. See, e.g., the Anglo-Norwegian Fisheries Case, ICJ Reports, 1951, p.116; In British Guiana Boundary Arbitration (1899) Parl. Papers (1899) No. 7, Cmd. 9533, Art. 4 of the 1897 Treaty of Washington laid down three specific rules, of which the first was "Adverse holding or prescription during a period of fifty years shall make a good title". See below, Chs. 3 and 4.

There is a further sense in which the term 'scientific' frontier or boundary is sometimes used, that is, to designate simply the degree of sophistication of the methods used in delimiting and demarcating a boundary. To quote Lord Curzon again:

Local surveys or reconnaissances ... precede the discussions of statesmen. Small Committees of officials are frequently appointed in advance to consider the geographical, topographical and ethnological evidence that is forthcoming, and to construct a tentative line for their respective Governments; this, after much debate, is embodied in a treaty, which provides for the appointment of Commissioners to demarcate the line upon the spot and submit it for ratification by the principals. Geographical knowledge thus precedes or is made the foundation of the labours of statesmen, instead of supervening at a later date to cover them with ridicule or reduce their findings to a nullity ...

Lastly, when the Commissioners reach the locality of demarcation, a reasonable latitude is commonly conceded to them in carrying out their responsible task. Provision is made for necessary departures from the Treaty Line, usually 'on the basis of mutual concession'; tribes or villages are allowed to use watering places or grazing grounds across the Frontier, or to choose on which side of the border they will elect to dwell ... When the Commissioners have discharged their duty ... beacons or pillars or posts are set up along the Frontier, duly numbered and recorded on a map. The process of demarcation has in fact become one of expert labour and painstaking exactitude.²⁰²

4.2.3 'Organic' Boundaries or Frontiers

The conditions of differential population growth, population pressures, differential economic and technological development and the influence of all these factors upon the

202. Curzon, op. cit., pp. 50-51.

political fate of countries attracted attention very early, and gave rise to the organic theory of state.²⁰³ Friedrich Ratzel was the first to develop the theory of organic growth of state:

there are boundaries which change so fast, e.g., boundaries of expanding peoples, that it is possible to speak directly of migratory boundaries ... the apparently rigid boundary is only the stoppage of a movement.²⁰⁴

Ratzel believed that the boundary was the peripheral organ of the state and that its fluctuations governed the strength or weakness of the state. The political concept is matched by what might be called the 'biological' or 'organic' school of political geography. State organisms are engaged in a continuous struggle for existence, and therefore often consider that aggressive expansion is necessary for their survival. Thus the struggle for existence means a struggle for space. Haushofer has incorporated such an idea:

We recognise the boundary through imperical observation as an organ, a living being, destined either to shrink or to push outward, not rigid, in no case a line - in contrast to the theoretical concept ...²⁰⁵

As territorial expansion is a mark of growth, so a sign of decline is the relinquishment of land that is valuable or necessary to a people's well-being.²⁰⁶ Advocates of the

203. Hans W. Weigert et al, Principles of Political Geography (New York: Appleton-Centry-Crofts, 1957), p.135.

204. Friedrich Ratzel, Politische Geographie, 3rd ed. by E. Oberhummer (Munchen, Berlin and Leipiz, 1897), p.386.

205. Karl Haushofer, Grenzen in ihrer geographischen und politischen Bedeutung (Berlin-Grunewald: K. Vowinckel, 1927), p.13.

206. Ellen Churchill Semple, Influence of Geographic Environment (New York, 1911), p.163.

organic concept of boundaries have supported their case with analogies of the human epidermis - as though the state enjoyed life in the literal organic sense, with necessity and physical requirements comparable to the physiological needs of the human being. It is easy enough to visualize the boundaries of a state expanding as it grows to maturity. The withering and shrinking of senility and even the amputation of limbs in youth and maturity are less edifying to contemplate. From these, supporters of the 'organic' concept shrink: once grown to maturity, the state and its boundaries must be conserved for an eternal prime. Accordingly, this approach provides a basis for the acquisition and retention of territory, it provides no mechanism for loss of territory or for modification of an existing boundary - or even for the most ordinary territorial transaction of cession.

The organic concept draws upon the superficial analogies of science to impress the unthinking bystander with the 'living' character of the state. By this theory, boundary changes occur only at intervals and usually as the result of wars, conquest or revolution, and no boundary can be permanently stable. Opposed to this concept is the one that sees an analogy to political boundaries in property boundaries. Property lines are not zones of struggle but mutually recognised partitions.²⁰⁷ Moreover, the boundary concept and the organic concept in essence have nothing in

207. Cf. Jones, op. cit., p.9.

common, and it can hardly be legally relevant to analogize between two totally separate things.

Transmuted into legal concepts, the organic theory of territory appears in a number of forms, each laying predominant or paramount stress upon the characteristics of territory which might link it most closely with a particular state - geographical association, historic contacts, economic use - and with the needs of the claimant - for security, in particular, but also for economic and social reasons. It is possible to exaggerate the organic link between State and territory. In some forms plain economic, geographical and social fact has been obscured in a miasma of sentiment which not only defies application as a legal principle but ceases to conform to reality.

4.3 All-comprehensive Classifications

Boggs propounds "a more comprehensive classification" in his treatise "International Boundaries"; he also refers to what have been called 'genetic boundaries'.²⁰⁸ The former could in fact include the latter, as well as a legal classification.

208. Under this category may be placed those classifications of boundaries which contain a significant degree of overlap between the two foregoing categories (Artificial and Natural). For details, see Boggs, op. cit., pp. 25-26.

4.3.1 Phenomenological Boundaries or Frontiers

Many boundaries, however, do not fall within the categories of 'naturally marked boundaries' and 'artificial boundaries', as those terms are properly defined. In an inaugural lecture, Nel classified boundaries as 'physical' and 'political'.²⁰⁹ Although no systematic classification is adopted to the great variety of boundary types found throughout the world, a more 'comprehensive' phenomenological classification of boundaries was attempted by Boggs in his work on International Boundaries. For descriptive purposes, the work is of considerable convenience, and as it will be adopted as a basis for the arrangement of succeeding chapters on the detailed legal problems involved in maritime boundaries, it will be convenient to set it out here. The four major groups or classes comprise:²¹⁰

- (A) Physical types, that is, boundaries which follow some feature marked by nature;
- (B) Geometrical types, that is, straight lines, arcs of circles, and similar types that disregard the physical geography and topography of the country;
- (C) Anthropogeographic types, related to human occupance of the land;
- (D) Complex or compound boundaries, such as compromise lines adjusted to a multiplicity of factors.

They can be subdivided as follows:

209. Deryck E. Nel, A Plea for a More Politico-Geographical Approach to Political Geography (Fort Hare U.P., 1966), p.42.

210. Boggs, op. cit., pp. 25-6.

(A) Physical types of boundaries

- (i) Mountains
 - (a) Mountain crests
 - (b) Water divides
- (ii) Deserts
- (iii) Lakes, bays, and straits
 - (a) Median lines
 - (b) Principal navigable channel
 - (c) Bank or margin
- (iv) Rivers and canals
 - (a) Median line
 - (b) Thalweg
 - (c) Bank or margin
- (v) Swamps
- (vi) Boundaries through territorial waters to the high sea
- (vii) Contour line (not the bank or margin of a river or lake).

(B) Geometrical types

- (i) Straight line (meridians, and other great circles)
- (ii) Parallel of latitude
- (iii) Rhumb line or loxodromic curve
- (iv) Arc of a circle
- (v) Line parallel to, or equidistant from, a coast or a river.

(C) Anthropogeographic types

- (i) Tribal boundaries
- (ii) Linguistic boundaries
- (iii) Religious boundaries
- (iv) Economic boundaries
- (v) Historical boundaries
- (vi) Cultural boundaries
- (vii) Private property lines already existing,
cadastral lines

(D) Complex or compound boundaries, such as compromise lines adapted to a multiplicity of factors.

4.3.2 Genetic Boundaries or Frontiers

There is need for classification of boundaries that pass beyond the mere physical factors, such as rivers and mountains, and that take account of the relationship between international boundaries and human society. And, indeed, boundaries have no significance except in relation to human beings. A genetic classification, which has been proposed chiefly by Richard Hartshorne, with suggestions from Stephen B. Jones and Derwent Whittlesey, is useful because it represents an attempt to discover the adaptations of boundaries to the factors of human occupation and use of the earth and the development of different cultures and customs (and vice versa). According to this classification, boundary can be grouped into the following four categories:

4.3.2.1 An antecedent boundary is a political boundary that is drawn before the development of most of the features of the cultural landscape.²¹¹ As societies have developed, they have adjusted themselves to these boundaries, which have thus acquired a historical and pragmatic sanction. The boundary between Canada and the United States, established and modified by treaty agreements between 1782 and 1846, belongs to this category. There were of course a few settlers and a more numerous body of nomadic trappers and Indians along the line of this boundary during the period of its delimitation; it was not, therefore, totally antecedent. On the other hand, the boundary between Canada and Alaska at the time when it was agreed upon by the Anglo-Russian Treaties of 1825 and 1827 ran through entirely unsettled and undeveloped territory. Such a boundary is totally antecedent of pioneering.²¹²

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211. Richard Hartshorne, "Suggestions on the Terminology of Political Boundaries", Mitteilungen des Vereins der Geographen an der universitat Leipzig, (1936) pp. 180-92. Abstract in 26 Annals of the Association of American Geographers (1936), pp. 56-57. Cf. idem, "Geographic and Political Boundaries in Upper Silesia", 23 Annals of the Association of American Geographers (1933) p.195. Amplifying this definition, Hartshorne has called attention to the fact that along this 'antecedent boundary' in Upper Silesia, the establishment of which antedated modern industrialization by several centuries, there grew a great development of mining and manufacturing on either side of the line and that the development on each side had an economic, transport, social, and cultural boundary which almost exactly followed, or conformed to, the old German-Russian political boundary - just because it was there. In other words, an antecedent political boundary does not merely endure in the face of new developments, but tends to influence developments, so that they conform to it.
212. Pounds classifies boundaries according to the cultural development in the borderland at the time when the boundary was drawn. Pounds, op. cit. pp. 71-72.

4.3.2.2 A subsequent boundary is one that is established after the cultural patterns have been formed, and, as a general rule, boundaries of this type conform to the borders between 'major or minor divisions of natural and cultural regions'. There has been a tendency for boundaries, especially in Europe, to approximate more and more closely the cultural divisions created by the differences of language. The boundary of India and Pakistan is in approximate conformity to a cultural division. Most recent transfers of territory and exchanges of population have been designed to bring political boundaries and cultural divisions into closer harmony.²¹³

4.3.2.3 Superimposed boundaries are those that are established after the territory to be divided has been settled and developed but, unlike the subsequent boundaries, they ignore completely the cultural and ethnic characteristics of the area divided. The boundaries of the Hapsburg Empire before 1918 belonged to this type. They cut off Romanians from Romania, Poles from Poland, Serbs from Serbia, and Italians from Italy. They were vigorously opposed by these

213. Ibid. The essential idea of the 'subsequent boundary' is that it is established subsequent to the development of the cultural pattern which now prevails. The German-Polish boundary in Upper Silesia, which was laid down in the period 1919-22, subsequent to the great German industrial development prior to 1914, was in this sense a subsequent boundary. Boggs, op. cit., pp. 28-29.

minority peoples and did not survive the break-up of the Hapsburg Empire in 1918. Many of the colonial boundaries in Africa also belong to this group, especially those of Ghana, Togo, Dahomey, Nigeria, and Cameroon. Each of these bisects at least one tribal territory. In the category of superimposed boundaries may also be included those which derive from truce lines which have been established at the conclusion of hostilities and have never been significantly modified by subsequent treaties. The boundary between the Netherlands and Belgium derives from such a truce line. That between North and South Korea is also essentially a truce line (the 38th parallel). The boundary around the Gaza Strip and that enclosing the western extension of Jordan were established when fighting ceased between Israel and her neighbours in 1948; they have been neither modified nor confirmed by international agreement.²¹⁴

4.3.2.4 Relict boundaries are those which have been abandoned for political purposes but which nevertheless remain discernible in the cultural landscape. For example, traces of Turkish architecture in the Balkans and of Spanish in the American Southwest demonstrate that these areas

 214. Pounds, op. cit., pp. 71-72. Cf. Hartshorne, op. cit., 26 Annals of the Association of American Geographers (1936), pp. 56-57; idem, "The Functional Approach in Political Geography", 40 ibid., (1950), p.97.

formerly lay on the other side of important political boundaries and derived aspects of their culture from sources other than those prevailing today. Such relict boundaries may well be archaeological curiosities in the landscape, but they are of political importance only when the former political area which evidence have left residues of political feeling.²¹⁵

To conclude, it is observed that both these classificational systems - the first phenomenological, the second genetic - have proved practical for analysis of the way in which boundaries create or avert conflict. On the other hand, there is little reason to take into consideration 'natural' and 'artificial' boundaries as all boundaries, in essence, are settled by international agreements based to a large extent on the application of equitable principles of international law.²¹⁶

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215. Pounds, op. cit., pp. 71-72. Hartshorne has described the way in which one may trace the former Russo-German border through the industrial region of Upper Silesia by studying the architecture of houses and public buildings as they differed from one another in the two empires.
216. See e.g., the Truman Proclamation of 1945 which states that: 'In cases where the continental shelf extends to the shores of another State, or is shared with an adjacent State, the boundary shall be determined by the United States and the State concerned in accordance with equitable principles'. US Presidential Proclamation No. 2667, 28 September 1945. UN Doc. ST/LEG/SER.B/1 (1951), pp. 38-39; the Royal Pronouncement of Saudi Arabia of 1949 affirms that the boundaries 'will be determined in accordance with equitable principles by Our Government in agreements with other States ... of adjoining areas', Ibid., p.22 [italics supplied]; the Proclamation of Abu Dhabi of 1949 proclaims that the boundaries are to be determined 'on equitable principles, by us after consultation with the neighbouring States', Ibid., p.23. See below, Ch. 3. Cf. The North Sea Continental Shelf Cases, ICJ Reports, 1969, p.3; Anglo-French Continental Shelf Arbitration, 54 ILR (1979), p.6. See below, Ch. 7.

5. A Legal Classification: Rights and Obligations of States within Their Boundaries

A classification of frontiers and boundaries for legal purposes is concerned less with the geographical, ethnic, historical, strategic, etc. characteristics of boundaries than with the rights and obligations of states. For legal purposes, it is more useful to classify frontiers and boundaries according to (a) the rights reserved to States within them, and (b) the obligations imposed upon States to respect them.²¹⁷

For the purpose of (a) we must classify boundaries as delimiting

- i) Territorial sovereignty²¹⁸ (over land and sea areas in the case of the 'territorial sea' and 'internal waters')²¹⁹

217. In Mortensen v. Peters [1906] 8 F.(J) 93, the Scottish Court of Justiciary declared that 'International law ... is the body of doctrine regarding the international rights and duties of states which has been adopted...'

218. The term 'territorial sovereignty' is used to designate the fullest rights which a state possesses over territory in international law. These include the executive, judicial and legislative powers of government and, in general, the power to dispose of territory and its resources. The exercise of these powers is subject only to rules of international law.

219. Territorial waters are those maritime areas which usually extend from a line running parallel to the shore to a specified distance (the limit of the territorial sea) measured from low-water mark. Within these waters non-coastal states may claim certain rights including the right of innocent passage for their vessels. Internal waters, however, are those maritime areas which are situated within the baselines from which the territorial sea is measured. They consist of a state's harbours, ports/

- ii) Sovereign rights²²⁰ (over submarine areas in the case of the 'continental shelf' and the 'exclusive economic zone')²²¹ for the purposes of exploring and exploiting, conserving and managing the mineral resources.

and roadsteads, its internal gulfs and bays, straits, lakes and rivers. In these waters, apart from special conventions, ships of non-coastal states are not legally entitled to a right of free access because those areas fall under the complete sovereignty of that state. See Arts. 2, 5 and 8 of the Draft Convention on the Law of the Sea, UN Doc.A/CONF.62/L.78 (28 August 1981).

220. The term 'sovereign rights' is legally distinct from 'sovereignty'. 'Sovereignty' is equivalent to an 'absolute right', whilst 'sovereign rights' is functional, limited. See below, Ch. 5.
221. One of the important results of the negotiation at the UNCLOS III is the broad support emerging for an exclusive economic zone (EEZ). In this zone of 200 miles from the territorial sea baselines, coastal States would have exclusive rights to both living and non-living resources. It is significant that the EEZ is measured not from the coast but from the baseline and that the coastal States may draw straight baselines of great length, enclosing as internal waters over a large marine area. For example, the UK has drawn extensive straight baselines on the west coast of Ulster which not only enlarges the areas of internal water, territorial sea and the fishery limits, but also extends the EEZ. Moreover, the EEZ does not retain high seas status under the Draft Convention on the Law of the Sea (UN Doc. A/Conf.62/L.78, 28 August 1981) but an sui generis impliedly as it came neither within the definition of the territorial sea (Art. 2) nor high seas (Art. 86). In current practice the legal position is clear. The theoretical argument that the EEZ should be regarded as part of the high seas is repudiated by Communist China. It is argued that 'if the EEZ were truly part of the high seas, then it would make no sense talking about the establishment of such a zone'. (Long Ching, Third UN Conference on the Law of the Sea, 6 August 1974, Peking Review, No. 33, 16 August 1974, pp. 5-6). Similar expression is found in the US Delegation Report for the Fifth Session of the UNCLOS III in 1976 [Eleanor C. McDowell, Digest of United States Practice in International Law 1976 (Dept. of State Publ., 1977), p.344]. For details see Draft Convention on the Law of the Sea, Pt. V, Arts. 55-75; Geoffrey Marston/

iii) Jurisdiction and control²²² (over contiguous²²³/fishery/

Marston, "The Development of the Law of the Sea with Special Reference to the Exclusive Economic Zone", 27 Issue 3 ULFJOTUR (1974), p.302; W.C. Extavour, The Exclusive Economic Zone: A Study of the Evolution and Progressive Development of the International Law of the Sea (Geneve: Institut Universitaire de hautes etudes internationales, 1979), Ch. v, p.171.

222. It should be noted that the term 'control' in the legal sense is not jurisdiction. The power, therefore, is primarily of the policeman rather than of the administrator or judge. Cf. Sir Gerald Fitzmaurice, "The Law and Procedure of the ICJ, 1951-54: Points of Substantive Law", Part I, 31 BYIL (1954), p. 379; idem, "The General Principles of International Law Considered From the Standpoint of the Rule of Law", 92 Recueil des Cours (1957-II), pp. 157-58, para. 88; idem, "Some Results of the Geneva Conference on the Law of the Sea", 8 ICLQ (1959), pp. 113-14. See above, 2.3.
223. The contiguous zone is 'a zone contiguous to its territorial sea' which fulfils the purposes of the claims intended primarily for the repression of smuggling and suchlike offences. In effect, the coastal State does not have sovereignty over its contiguous zone, but may exercise control therein, in order to enforce compliance in its territory and territorial sea with certain of its laws and regulations. See Draft Convention on the Law of the Sea, Art. 33. Cf. The Behring Sea Fur Seal Arbitration (1893), Moore, International Arbitrations, Vol. 1, p.755; The I'm Alone Arbitration [1935] III RIAA, p. 1609; J.A. Martial, "State Control of the Air Space Over the Territorial Sea and the Contiguous Zone", 30 Canadian Bar Review (1952), p.245.

conservation/anti-pollution zones)²²⁴ for the purpose:

custom, sanitation, fiscal, fishing, pollution,

preservation of the marine environment etc.

iv) General rights of administration and occupancy.

v) Belligerent occupation.²²⁵

224. The waters of these zones retain their status as high seas and are not subject to the sovereignty of the coastal state. Cf. D.W. Bowett, The Law of the Sea (Manchester U.P., 1967), pp. 20-26; Victor Fitzmaurice, A Critical Assessment of Pollution Control Laws Regulating the Development of Petroleum Resources in the United Kingdom and Norwegian Sectors of the North Sea (Ph.D. Thesis, University of Edinburgh, 1977); Geoffrey Marston, "Delimitation of Maritime Zones - Recent Commonwealth Decisions", 51 BYIL (1980), pp. 263-67; The Canadian Arctic Waters Pollution Prevention Act, 1970, 1969-70 Can., C.47. Under new sections 741 and 769 of the 1971 Canadian Shipping Act, a pollution prevention officer may require/go on board/order any ship that he suspects on reasonable grounds is carrying a pollutant and that is within waters to which this Part applies, viz. a 100 mile zone from the baselines. 1970-71, Can. C.27.

225. It is manifest that the military occupant cannot acquire sovereignty durante bello. In the South West Africa Cases, Judge Jessup expressed his opinion that: 'It is commonplace that international law does not recognise military conquest as a source of title', ICJ Reports, 1966, p.418. That belligerent occupation does not itself transfer sovereignty is also confirmed by Art. 47 of the Geneva Convention of 1949, Para. 358 of the United States Army Field Manual of 1956 and Para. 512 of the United Kingdom Manual of Military Law of 1958.

vi) Rights of administration and occupation with certain restrictions, namely, ratione materiae,²²⁶ ratione personae²²⁷ or ratione temporis,²²⁸ mandate, trusteeship, certain international leases.²²⁹

vii) Property rights.

In connection with the sea, alignment of jurisdictional or sovereign limits depends upon specific distances from the baseline.²³⁰ In fact, the offshore sovereignty complex with regard to the law of the sea comprises a system of jurisdictional limits separating:

226. (Jurisdiction) by reason of the subject matter.

227. (Jurisdiction) by reason of the party.

228. Conditioned by reference to time. In the Electricity Company of Sofia Case, where Bulgaria as defendant relied on the Belgian limitation ratione temporis. For details, see Shabtai Roseanne, The Time Factor in the Jurisdiction of the International Court of Justice (Leyden: A.W. Sijthoff, 1960).

229. Territory as such is placed under the administration of some state, for example, South Africa in the case of South West Africa (Namibia), which will exercise jurisdiction over it, that is, will perform all the usual governmental functions of enacting legislation, providing a judicial system and administering the area. The exercise of rights of sovereignty may be restricted by treaty or by custom. One state may 'lease' a part of its territory to another either for a term of years or in perpetuity. In this case, the lessee state will in fact administer the territory, while the lessor retains a theoretical 'sovereignty' over it. Cf. Peter Wesley-Smith, Unequal Treaty, 1898-1997: China, Great Britain and Hong Kong's New Territories (Hong Kong: Oxford U.P., 1980).

230. The baseline, in theory at least, represents the coast and separates two areas of sovereign territory within a single state.

- (1) Maritime zones of different categories belonging to the same state;
- (2) Maritime zones of a state from those with no sovereignty, i.e. high seas; and
- (3) Maritime zones of any category belonging to different states. For example, the seaward limits of the territorial sea is 12 miles from the coast and runs between a sovereign state and an area without sovereignty.²³¹

It must be borne in mind that the continental shelf is the natural prolongation of land territory under the sea. Submarine boundaries are those which separate the submarine areas of two (or more) coastal states. These limits qualify as international boundaries in their function, but in almost all instances are not marked by buoys in the superjacent waters or marked on charts.²³² In addition to the seaward limits of the maritime and submarine areas, there are four specific types of limits allowed for the great majority of situations whereby sovereign and jurisdictional rights between states need to be distinguished:

231. Cf. Anglo-Norwegian Fisheries Case, ICJ Reports, 1951, p.116. See below, Ch. 7.

232. Maps and charts frequently show symbolized lines extending through water, as between or among islands or between islands and mainland. Such lines normally do not represent boundaries, and should not be so construed. Rather, they serve as a catographic device by which to indicate that all land areas on the one side belong to one state and all land areas on the other side belong to another state.

1. Maritime boundaries separating the territorial seas of adjacent coastal states.
2. Maritime boundaries separating the territorial seas of opposite states.
3. Submarine boundaries separating the continental shelves of adjacent states.
4. Submarine boundaries separating the continental shelves of opposite states.

For the purposes of (b) we need to classify boundaries according to their origins:

- i) Unilateral act
- ii) Bilateral treaty
- iii) Multi-lateral treaty
- iv) Custom
- v) Acts of international conferences and organisations
- vi) Arbitration and judicial decision.

It might be possible to classify boundaries broadly according to their legal effects as: unilateral, contractual or dispositive. The obligations imposed by the boundary must also be classified by degree, i.e. according to the chronological stage reached in the process of allocation, delimitation, demarcation and administration.

The issues involved in the first part of this classification - i.e. the rights defined by the boundary in connection with the various rights which States may possess in respect of territory. Here they need only be discussed in the

context of specific types of boundary. However, it will be useful to bear in mind a few simple points of legal principle in connection with the second part of classification - the obligations imposed by a boundary - which are sometimes lost sight of or glossed over.

First, a frontier or boundary claimed by unilateral act - of occupation, annexation, prescription, etc. - can impose an obligation only upon the claimant state, and that only through the principle of estoppel, preclusion or personal bar.²³³ It may however, through the effluxion of time, attain a more permanent status by application of the principle quieta non movere.²³⁴ It may also result in the conferment of 'acquired' or 'vested' rights upon individuals (property rights, etc.) which may, by the same principle, be accorded respect whatever the future fate of the boundary as such;

233. Modern international law finds itself armed with a rather bewildering array of consensual and quasi-consensual devices such as prescription, consolidation, acquiescence, protest, waiver, recognition and estoppel. These concepts have been applied in territorial and boundary disputes. But they do not provide an altogether satisfactory basis for decision: they are insufficiently sophisticated to resolve complex problems. See Munkman, op. cit., 46 BYIL (1972-1973), p.1; D.W. Bowett, "Estoppel Before International Tribunals and Its Relation to Acquisition", 33 ibid (1953), p.176; I.C. MacGibbon, "Estoppel in International Law", 7 ICLQ (1958), p.507; G. Venturini, "La portee et les effets juridiques des attitudes et des actes unilateraux des etats", 112 Recueil des Cours (1964-II), p.367; Antoine Martin, "L'Estoppel en droit international public" (Paris: Editions A. Pedone, 1979). See above, Ch. 4.

234. See below, Ch. 2.

or may, indeed, influence any future agreed or impartial delimitation of the boundary.

Secondly, bilateral and multi-lateral agreements bind only the parties to them, and the same must in principle be true of treaties establishing international frontiers or boundaries. Pacta tertiis nec nocent nec prosunt.²³⁵

Again, of course, the principle quieta non movere may give dispositive effect to boundaries in the original contract.

Nevertheless, in principle, no boundary delimited contractually can generally affect the rights of possible future claims of third parties. In particular, such doctrines as the uti possidetis principle adopted in the nineteenth century in South and Central America as a type of Latin American Monroe Doctrine²³⁶ could not as such legally prohibit -

235. Art. 18(a) of the Harvard Research Draft Convention on Treaties provides: "A treaty may not impose obligations upon a state which is not a party thereto". Arts. 34-38 of the 1969 Vienna Convention on the Law of Treaties. For details, see R.F. Roxburgh, International Conventions and Third States (London: Longmans, Green & Co., 1917), Chs. IV and V, pp. 29 et seq; Lord McNair, The Law of Treaties (Oxford: Clarendon Press, 1961), Ch. XVI, p.309; idem, "A Note on Pacta Tertiis", Varia Juris Gentium. Liber amicorum J.P.A. Francois (Leiden: A.W. Sijthoff, 1959), p.188; I.M. Sinclair, The Vienna Convention on the Law of Treaties (Manchester U.P., 1974), pp. 76-79; Christos L. Rozakis, "Treaties and Third States: A Study in the Reinforcement of the Consensual Standard in International Law", 35 Zao R.V. (1975), pp. 1-40.

236. The doctrine was a rule of policy, not law. It was not a legal ground on which an international tribunal could possibly hold that the title of a European Power to territory in South and Central America was void in law. For Monroe Doctrine, see C. Tower, "The Origin, Meaning and International Force of the Monroe Doctrine", 14 AJIL (1920), p.1; A. Pearce Higgins, "The Monroe Doctrine", 5 BYIL (1924), pp. 103-18; Charles Rousseau, Droit International Public, Tome IV (Paris: Sirey, 1980), Ch. 2, pp. 53-108.

although, allied to the Monroe Doctrine, they might, and did, politically inhibit - claims by extra-continental powers to unadministered regions.

Thirdly, to claim that a boundary is established by custom, it must be shown that the custom in question is at least bilateral as between the relevant neighbouring States. Tribal or popular custom, or unilateral state claims may influence, but cannot constitute, international custom.

Fourthly, a boundary established for a certain purpose, and marking the limit to the exercise of certain rights, cannot be regarded as a boundary limiting the exercise of other rights. For example, a boundary established to delimit a sphere of influence, an area of exclusive administration and control, or an area under belligerent occupation, does not necessarily delimit the boundaries of territorial sovereignty. It may, however, acquire a different status through the passage of time.

Fifthly, in legal terms, a frontier is not a boundary. The establishment of a frontier - for example, a river or mountain range - does not of itself supply a more detailed boundary delimitation.

To conclude, we can see there are both differences and similarities in land and sea boundary principles and background. Both are, however, relevant to the problems of delimitation concerning the China Seas islands with which this dissertation is concerned.

CHAPTER IIFUNDAMENTAL PRINCIPLES RELEVANT TO THE ESTABLISHMENT OF
BOUNDARIES1. Introduction

It has been shown in the previous chapter that the major legal function of a state boundary is to define the region in which the state possesses the rights to exercise jurisdiction and to exclude any other state. The primary object of the boundary is thus to maintain territorial 'stability' and effectiveness. In this chapter we shall consider these two fundamental principles which are connected with the establishment of boundaries. First, there is the principle of stability, which has consistently been given paramount importance by international judicial and arbitral tribunals, emphasising the need for stability of territorial situations. Secondly, there is the principle of effectiveness, which is also relied on by international tribunals relating to land and sea areas. One should note that these principles of 'stability' and 'effectiveness' are essential elements in boundary settlements.

2. Principle of Stability

International law aims at maintaining security and stability; it protects title to territory where this objective would otherwise be defeated; it substitutes title to territory when the object is no longer served by maintaining ancient rights, and when in fact, it might actually be subverted by doing so.

The clear delimitation of its territory furnishes the state with the recognised setting for the exercise of its sovereign powers. The establishment of at least the relative stability of this territory is a function of the exclusive authority which the state exercises within it, and of the coexistence beyond its frontiers of other external political entities endowed with similar prerogatives. De Visscher clearly over-emphasises the significance of the 'firm configuration' and 'stability' of state territory. Not only does this furnish 'the state with the recognised setting for the exercise of its sovereign powers' but furthermore, as territory has long been a framework for security, stability is the factor which above all guarantees security. The security that people feel in the shelter of recognised frontiers is a confidence that has grown in them with the consolidation in a community of aspirations and memories of the bonds uniting them to a soil that they occupy. It is this aspect especially that has played a major role in the establishment of modern states. This sentiment may explain the extreme sensitivity of opinion to every issue relating to territorial integrity.¹

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1. Charles de Visscher, Theory and Reality in Public International Law, English trans. by P.E. Corbett (Princeton U.P., 1968), p.206. We should bear in mind that modern international law did not give prominence to the real right attached as such to the territory but to the right attached to the people of the territory. See II YBILC (1974), p.73, para. 417.

The picture is attractive; but one has only to consider how few boundaries in Africa, America, Asia or Europe are even a century old, and few states can in fact boast fifty years of independence, to see that it is quite false. The only people to whom this could apply would be those in the oldest European states, namely, France and Spain, that have undergone least radical alteration in frontiers in the last five hundred years. The attachment of the individual to the land may be strong; it is not necessarily reflected in attachment to a particular state, or in the configuration and stability of state boundaries; still less to the maritime extensions of such states.

2.1 Quieta Non Movere

The principle quieta non movere² was invoked by the Permanent Court of Arbitration in the Grisbadarna Arbitration (Sweden - Norway). It stated that:

Whereas ... it is a settled principle of the law of nations that a state of things which actually exists and has existed for a long time should be changed as little as possible....

2. A settled state of affairs should not be disturbed. Cf. Separate Opinion of Judge Jessup in the North Sea Continental Shelf Cases, ICJ Reports, 1969, p.67, at pp. 79-81. For discussion, see I.C. MacGibbon, "Some Observations on the Part of Protest in International Law" 30 BYIL (1953), p.138; idem, "The Scope of Acquiescence in International Law", 31 BYIL (1954) pp. 152, 159; idem, "Estoppel in International Law" 7 ICLQ (1958), p.507. See below, Ch. 4.
3. [1909] XI RIAA, p.147, English trans. in 4 AJIL (1910) p.233; J.B. Scott, The Hague Court Reports, Vol. I (1916-32), pp. 121, 130. In Her Majesty's Attorney-General for British Honduras v. John Bristowe and Charles Thomson Hunter, the Judicial Committee of the Privy Council held, in an information of intrusion relating/

This principle of general law is particularly supported by Gidel⁴ and de Visscher.

In the Anglo-Norwegian Fisheries Case, the ICJ maintained that 'for a period of more than sixty years the United Kingdom Government itself in no way contested' the Norwegian establishment of a well-defined straight baseline system.⁵ The term 'historical consolidation' in international law made its first appearance as a basis of territorial title in this case. Norway was able to show that neither the promulgation of Decrees establishing its baseline system, nor their application, had met with opposition by foreign states. Of this the Court observed:

Since ... these Decrees [Norwegian Decrees of 1869 and 1889] constitute ... the application of a well-defined and uniform system, it is indeed this system itself which would reap the benefit of general toleration, the basis of an historical consolidation which would make it enforceable as against all states.⁶

relating to land in British Honduras, that the defendants having shown sixty years adverse possession there from before 1817, by themselves and their predecessors in title, without disturbance or effectual claim by the Crown, such information must be dismissed. (1880) L.R. 6. App. Cas. 143; 2 BILC 403.

4. G. Gidel, Le droit international public de la mer, Vol. III (Paris: Sirey, 1934), p.634. It is also the case in Muslim Law, Majallat El Alkam, Art. 15. Cf. Separate Opinion of Judge Ammoun in the North Sea Continental Shelf Cases, ICJ Reports, 1969, p.101, at pp. 113-14.
5. ICJ Reports, 1951, p.138. See below, Ch. 7.
6. Ibid. The term 'historic consolidation' in relation to the acquisition of an historic title was first resorted to as dictum in this case where the Court justified the validity of the application by Norway of the straight baseline system on the ground of "an historic consolidation which would make it enforceable as against all states'.

At first glance, this might appear to mean no more than that title to maritime areas depends for its validity erga omnes upon acquiescence over a significant period of time by the generality of maritime states. It seems that the Court recognised the existence both of 'immemorial possession' ('straightforward possession' or 'possession simpliciter') and of 'prescription' (adverse possession) as modes of acquiring title to territory. Also, the Court seems to have confirmed the view that the appropriation by a single state of areas, which under general international law would be high seas, is a kind of 'adverse possession' at the expense of the international community which requires the toleration or acquiescence of the generality of states.⁷

De Visscher elaborated the concept of 'consolidation'⁸ into a criterion for determining sovereignty over both land

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7. Ibid., p.139. Cf. Separate Opinion of Judge Hsu Mo, p.154. See D.H.N. Johnson, "Acquisitive Prescription in International Law", 27 BYIL (1950), pp. 350 et seq; idem, "Consolidation as a Root of Title in International Law", 13 Cambridge L.J. (1955), p.222. See below, Ch. 3.
 8. 'Consolidation' in municipal law means the combination, in a single measure, of statutory enactments relating to the same subject-matter scattered over different Acts. In essence, consolidation does not make any fundamental change in the form of the law. The law consolidated was embodied in Statutes, and after consolidation it still remains Statute law. Sometimes, where a particular phrase in the Acts consolidated has received judicial interpretation, the phraseology is altered so that occasionally effect is given to case law by consolidation. Viscount Birkenhead, Points of View, Vol. I (London: Hodder and Stoughton, 1922), VI, p.151.

and sea areas in which, paradoxically, neither acquiescence nor the passage of time play an important role. Thus, as Professor Johnson says, de Visscher has embraced under a single heading of 'consolidation' both 'prescription' and 'immemorial possession' by founding them on the juridical basis of acquisition.⁹ De Visscher's concept of consolidation reflects the experience of the Anglo-Norwegian Fisheries Case, and it provides a fair description of the criteria applied in that decision, and in other decisions relating to sea areas, like the North Atlantic Coast Fisheries¹⁰ and Gulf of Fonseca¹¹ Cases. It is thus worth quoting his formulation of the concept, which he associates with the fundamental interest of the stability of territorial situations and the principle quieta non movere.

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9. Johnson, op. cit., 13 Cambridge L.J. (1955), p.223; Yehuda Z. Blum, Historic Titles in International Law (The Hague: Martinus Nijhoff, 1965), p.336. 'Prescription' and 'immemorial possession' have always been embraced in the heading 'acquisitive prescription' but de Visscher prefers the term 'consolidation'. See R.Y. Jennings, The Acquisition of Territory in International Law (Manchester U.P., 1963), p.25 n.1. Cf. Johnson, op. cit., 27 BYIL (1950), p.332.
10. In the North Atlantic Coast Fisheries Arbitration (United States - Great Britain)(1910) XI RIAA, p.167, at p.197, the Arbitral Tribunal recognised that: 'conventions and established usage might be considered as the basis for claiming as territorial those bays which on this ground might be called historic bays'.
11. II AJIL (1917), p.674.

This consolidation, which may have practical importance for territories not yet finally organised under a State regime as well as for certain stretches of sea, such as bays, is not subject to the conditions specifically acquired in other modes of acquiring territory. Proven long use, which is its foundation, merely represents a complex of interests and relations which in themselves have the effect of attaching a territory or an expanse of sea to a given State. It is these interests and relations, varying from one case to another, and not the passage of a fixed term, unknown in any event to international law, that are taken into direct account by the judge to decide in concerto on the existence or non-existence of a consolidation by historical titles. ... it can be held to be accomplished not only by acquiescence properly so called, acquiescence in which the time factor can have no part, but more easily by a sufficiently prolonged absence of opposition either, in the case of the land, on the part of States interested in disputing possession or, in maritime waters, on the party of the generality of States.¹²

The essentials of this formulation have been proven long use, allied to a complex of interests and relations which in themselves have the effect of attaching a territory or an expanse of sea to a given state, and acquiescence or a sufficiently prolonged absence of opposition. Its major defects are its vagueness - it makes no attempt to analyse the complex of interests and relations involved - and it merely purports to be yet another mode of acquiring title to the existing traditional list. Moreover, it does require some time element (long use, prolonged absence of opposition) to operate and also some element of acquiescence, whether properly so called or not. Consequently, it can provide

12. De Visscher, op. cit., p.209.

little guidance for the decisions of concrete disputes.¹³

The theoretical formulation which best approximates to the detailed criteria actually followed by tribunals is that of Sir John Fischer Williams:

If indeed we ask, not what is in fact the basis on which the actual international ownership of territory rests, but what are the considerations by which an international tribunal would normally be guided if called on to decide the fate of a territory, we shall find, perhaps, the most authoritative statement of those considerations in the recitals to the treaty ... signed at Paris on October 28, 1920, between the Principal Allied Powers ... and Roumania ..., for regulating the destinies of Bessarabia ... The reasons given are (1) the interests of the general peace of Europe, (2) geographical, ethnographical, historical, and economic considerations, (3) proof given that the population desired the actual settlement made, and lastly (4) the desire of Roumania to guarantee good government generally and, in particular, protection¹⁴ of racial, religious and linguistic minorities.

This formulation provides a modern set of considerations appropriate to territorial changes, and also accords surprisingly accurately - although not founded on them - with the considerations which have been applied by judicial tribunals to resolve questions of disputed sovereignty over land territory.¹⁵

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13. For comment, see Johnson, op. cit., 13 Cambridge L.J. (1955), pp. 222 et seq; Jennings, op. cit., pp. 23-28. Cf. A.L.W. Munkman, "Adjudication and Adjustment - International Judicial Decision and the Settlement of Territorial and Boundary Disputes," 46 BYIL (1972-1973), p.1, at p.104.
 14. Sir John Fischer Williams, "Sovereignty, Seisin, and the League", 7 BYIL (1926), p.24, at p.34.
 15. Munkman, op. cit., p.104.

Similarly, in the preamble of a boundary treaty, the governments of the Argentine Republic and the Eastern Republic of Uruguay considered that

While they have identical rights over the said section of the river, there are other factors which should be taken into account when setting it as a boundary, for example, its general configuration, the characteristics of its navigable channels, the presence of islands in its bed, historical claims to those islands and instruments of present jurisdiction over them, and also the practical requirements of navigation, have decided to adopt as the boundary a composite line which shall take into account the aforesaid considerations and at the same time satisfy as fully as possible the aspirations and interests of the two Contracting States.¹⁶

If one compares the passage quoted above with the judgment of the ICJ in the North Sea Continental Shelf Cases, viz., 'in balancing the factors in question, it would appear that various aspects must be taken into account. Some are related to the geological, others to the geographical aspects of the situation, others again to the idea of the unity of any deposits. These criteria ... can provide adequate bases for decision, adapted to the factual situation',¹⁷ it appears

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16. Treaty between the Argentine Republic and the Eastern Republic of Uruguay concerning the boundary constituted by the River Uruguay. Signed at Montevideo, on 7 April 1961. See 635 UNTS (1968), No. 9074, p.98 [italics added]. In the Argentine-Chile Frontier Arbitration [1966] XVI RIAA, p.109, at pp. 176-77, the Court concluded, on the basis of the historical and scientific evidence, that the Eastern Channel of the River Encuentro is the major channel.
 17. ICJ Reports, 1969, pp. 50-51, para. 94. The Court explained that there is no legal limit to the considerations that States may take into account to ensure the application of equitable principles. Various features had to be put into the balance including geological and/

that the delimitation of the continental shelf boundaries is chiefly in connection with an equitable division in all aspects of the continental shelf among the states concerned. In practice, stress is often laid on the need for acceptable, agreed delimitation based on equitable solutions. There is, as the Anglo-French Continental Shelf Arbitration shows, no longer even a presumption in favour of the equidistance principle in the delimitation of adjacent areas of shelf, and the actual delimitation is based on equitable principles.¹⁸

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and geographical phenomenon. Ibid., p.50, para. 93. The Court further found that 'delimitation is to be effected by agreement in accordance with equitable principles' thus envisaging new negotiations. ICJ Reports, 1969, para. 101(c)(i). In the Anglo-French Continental Shelf Arbitration, the Court of Arbitration found that in practice there was little difference between the equitable principles applied in the North Sea Continental Shelf Cases and the effect of taking into consideration 'special circumstances' under the Continental Shelf Convention.

18. Miscellaneous No. 15 (1978), Cmd. 7438, pp. 114-15, paras. 245-46. Under Article 5 of the 1898 Convention between France and Great Britain, the two Governments agree 'to fix by mutual agreement ... the most equitable delimitation between the British and French possessions in the region situated to the West of the Lower Niger'. A.M. Stuyt, Survey of International Arbitrations (Leiden: A.W. Sijthoff, 1972), Nr. 194, p. 200. See below, 2.6.3.

2.2 Principal function of boundaries

One of the principal functions of the international boundary is to preserve territorial 'stability'. Thus, in 1958 at the First United Nations Conference on the Law of the Sea (UNCLOS I), the United Kingdom proposed, inter alia, that:

In delimiting the boundaries of the submarine areas ... any lines which are drawn in accordance with the principles set out ... of this article shall be defined with reference to charts and to geographical features as they exist at a particular date and reference shall be made to fixed permanent identifiable points on the land.¹⁹

Iran pointed out that the United Kingdom proposal was intended to prevent any subsequent fluctuation of the boundary once it had been defined. The United States also expressed its view that the British amendment would give the median line, once established, greater stability.²⁰

In the Aegean Sea Continental Shelf Case, Greece contended that the dispute concerned the delimitation of the continental shelf boundary between Greece and Turkey. The Court observed that:

The dispute relates to the determination of the respective areas of continental shelf over which Greece and Turkey are entitled to exercise the sovereign rights recognised by international law. It/

19. UN Doc. A/CONF.13/C.4/L.28 (21 March 1958), UN Doc. A/CONF.13/42, p.134.

20. UN Doc. A/CONF.13/C.4/SR.32 (9 April 1958), UN Doc. 13/42, pp. 94-95, paras. 13 and 25.

It is therefore necessary to establish the boundary or boundaries between neighbouring States, that is ... to draw the exact line or lines where the extension in space of the sovereign powers and rights of Greece meet those of Turkey. Whether it is a land frontier or a boundary line in the continental shelf that is in question, the process is essentially the same, and inevitably involves the same element of stability and permanence, and is subject to the rule excluding boundary agreements from fundamental change of circumstances.²¹

2.3 Preambles to Boundary Treaties

It will be shown later that international judicial and arbitral tribunals, when faced with boundary disputes, sustained awareness of the importance of achieving 'stability' in all the proceedings leading to the finality of boundary disputes in accordance with the principle interest reipublicae ut sit finis litium.²² This proposition, as we shall see, is also supported by the preambles to most boundary treaties. It would be wrong to assume that the preamble to a treaty is only textually part of the treaty, and that therefore it has no legal effect, because it does not contain any substantive provisions but consists merely of a recital of facts and motives. If fact, from the interpretative standpoint,

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21. ICJ Reports, 1978, pp. 35-36, para. 85 [italics added]. Turkey claims a bigger share of the potentially oil rich Aegean continental shelf, that is, the sea-bed under the high seas. It argues that the multitude of Greek islands there can claim no sea-bed beyond their six mile territorial sea. Mario Modiano, "Tension as Greek meets Turk in the Aegean", The Times, 12 March 1982, p.8; idem, "Truce agreed by Greece and Turkey", The Scotsman, 22 April 1982; idem "Papandreu receives a Turkish olive-branch", The Times, 7 November 1981, p.4.
22. Co. Litt. 303. It concerns the state that there be an end of lawsuits.

a preamble does have legal effect. A treaty usually contains a statement of the motives or objects of the parties in making it, and can therefore be used as a guide and aid in interpreting the directly operative clauses. For example, in the Asylum Case, the ICJ did use the preamble to a treaty.²³

Preambles always embody the primary objects of the texts. In boundary treaties, preambles often express the intention of the party to achieve 'stability' in respect of their acquired common boundary. For instance, in the 1961 Treaty between Argentina and Uruguay concerning the boundary constituted by the River Uruguay, the preamble stressed that the Contracting Governments 'have decided to settle once and for all the question of the boundaries situated in the section of the River Uruguay which constitutes

23. This is so in two ways especially: (1) in order to elucidate the meaning of clauses the purpose of which might otherwise be doubtful; (2) to indicate the juridical 'climate' in which the operative clauses should be read, whether for instance literally or restrictively, broadly or restrictedly. In the Asylum Case, the Court took the view that the Havana Convention must be interpreted strictly as having a generally restrictive intention. ICJ Reports, 1950, p.282. In the Island of Palmas Arbitration, Max Huber referred to the terms of the preamble to the 1925 compromis between USA and the Netherlands which he regarded as 'the evident will of the parties'. II RIAA, p.869. See G.G. Fitzmaurice, "The Law and Procedure of ICJ: Treaty Interpretation and Certain Other Treaty Points", 28 BYIL (1951), pp. 24-25; Lord McNair, Law of Treaties (Oxford: Clarendon Press, 1961), Ch. XX, p.364. I.M. Sinclair, The Vienna Convention on the Law of Treaties (Manchester U.P., 1973), pp. 69-76.

the frontier between the two countries'.²⁴

The inviolability of the boundary is considered sacrosanct in the practice of states.²⁵ Some boundary treaties based their compromise, in particular, on the ground of stability. In conformity with its Preamble of the United States - Mexico Convention for the Solution of the Problem of the Chamizal of 1963 provided that:

The United States of America and the United Mexican States ... convinced of the need for continuing the program of rectification and stabilization of the Rio Grande which has been carried out under the terms of the Convention of February 1, 1933, by improving the channel in the El Paso-Ciudad Juarez²⁶ region, have resolved to conclude a Convention ...

According to the preamble of the 1968 Agreement concerning the sovereignty over the Islands of Al-'Arabiyah and Farsi and the Delimitation of the Boundary Line Separating the Submarine Areas between the Kingdom of Saudi Arabia and Iran, the two Governments

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24. 635 UNTS (1968), No. 9074, p.98 [italics added]; 709 ibid (1970), Annex A, p.332 et seq.
 25. For example, Art. 5 of the 1848 Treaty of Guadalupe Hidalgo between the United States and Mexico states: "The boundary line established by this Article shall be religiously respected by each of the two republics and no change shall ever be made therein, except by the express of free consent of both nations lawfully given by the General Government of each in conformity with its Constitution". S. Ex. Doc. 60, 30 Cong. 1 sess.
 26. 505 UNTS (1964), No. 7374, p.185 [italics added]. Cf. 724 UNTS (1970), No. 7374 p.308. For a discussion see L.C. Wilson, 'The Settlement of Boundary Disputes; Mexico, the United States, and the International Boundary Commission', 29 ICLQ (1980), p.38.

Desirous of resolving the difference between them regarding sovereignty over the islands of Al-'Arabiyah and Farsi and [d]esirous further of determining in a just and accurate manner the boundary line separating the respective submarine areas over which each party is entitled by²⁷ international law to exercise sovereign rights.

Undoubtedly, there is an element of finality about the expressions 'resolving' and 'determining' as used in this context, which is intended by the parties to achieve 'stability'.

2.4 International Concession Agreement

The principle of stability as applied to the submarine boundary is closely connected to the notion of concession. A concession agreement, if analogised to municipal law, lies somewhere between a 'contract' (between private parties) and a 'treaty' (between governments) since it is an agreement between a private party and a foreign government for the purposes of exploration and exploitation of mineral resources. In view of its juridical character, unless a specific clause is provided, international law is not normally applicable.²⁸

For example, in the Serbian and Brazilian Loans Case, the PCIJ held that a contract between a foreign investor and a state could only be governed by some municipal law.²⁹

27. 696 UNTS (1969), No. 9976, p.212 [italics added].

28. E. Lauterpacht, "Some Aspects of International Concession Agreements", 1 Bulletin of the Harvard International Law Club (1959), pp. 5-8. Cf. Saudi Arabia v. Arabian American Oil (Aramco) [1958] 27 ILR (1963), p.117; Petroleum Development (Qatar) Ltd. v. Ruler of Qatar [1950] 18 ILR (1957), Case No. 38, p.161. See below, 3.2.

29. 1929, PCIJ Ser. A, No. 20, p.41. Cf. the USA on behalf of P.W. Shufeldt against the Republic of Guatemala [1930] 24 AJIL (1930), p.799. For summary, J.W. Garner, "Arbitration - Cancellation of Concession", 12 BYIL (1931), pp. 170-71.

More recently, in the cases of B.P. v. Libyan Arab Republic³⁰ and Texaco v. Libyan Arab Republic,³¹ it is accepted that certain contracts can be 'internationalised' in a number of ways and therefore subject to a mixed regime of international and municipal law.

Moreover, oil concession agreements always include 'stabilisation clauses' which act as an effective instrument to guarantee the status quo and protect foreign investors' interests.³² Thus, in Texaco v. Libyan Arab Republic, Professor R.J. Dupuy, the sole Arbitrator recognised that:

- 30. 1973 and 1974. Award (Merits), 53 ILR (1979), p.300.
- 31. 1975 and 1977. Award (Preliminary), 53 ILR (1979), p.393; Award (Merits), p.422. For summary, see D.W. Bowett, "Libyan Nationalisation of American Oil Companies ' Assets", 37 Cambridge L.J. (1978), pp. 5-8.
- 32. See e.g., Clause 16 of the Deeds of Concession between the Libyan Government and the Texaco Overseas Petroleum Co. ("Topco") and California Asiatic Oil Company ("Calasiatic"), 1955-1968. 53 ILR (1979), pp. 455-7; Letter of Guaranty, Petroleum Concession Agreement between Egypt, the Egyptian General Petroleum Corporation, the General Petroleum Company and the Egyptian Petroleum Development Company Ltd. (EPEDECO), 1975; Peter Fischer (ed) A Collection of International Concessions and Related Instruments. Contemporary Ser. Vol. 1 (New York: Oceana Publ., 1981), p.191, at p.310. Cf. Horsmans and Verwilghen, "Stabilite et Evolution du Contrat Economique International" Le Contrat Economique International (1975), p.451.

Oil concessions... while remaining in the nature of acts governed by public law, have a contractual character which is much more designed to afford to operators who assume important economic risks guarantees of greater stability.³³

Apart from oil concessions, long-term stabilised terms are also used in contracts as incentives for foreign investment promotion.³⁴

Upon change of sovereignty the successor state does not automatically inherit the rights and duties comprised in the concession agreement. These come to an end with the extinction of the personality of one of the parties to the contract, or the obliteration of its sovereignty in the territory which is subject to the operations of the concession. Besides his contractual rights, the concessionaire has an equitable interest in his investment and labour. The contractual duty expires with the change of sovereignty,

33. Award (Merits) 53 ILR (1979), p.478 [italics added]. For discussion see Robin C.A. White, "Expropriation of the Libyan Oil Concessions - Two Conflicting International Arbitrations", 30 ICLQ (1981), p.1.
34. See, e.g., the 1975 Agreement on Foreign Capital Investment between the Government of Chile lies in a very detailed set of guarantees which in principle assure non-discrimination and non-interference by the government in investment operations for 30 years. See A Collection of International Concessions and Related Instruments. Contemporary Ser., Vol. 1, pp. 467-68. Cf. the United Nations General Assembly Declaration on Permanent Sovereignty over Natural Resources, UN Doc. A/Res. 1803 (XVII), 14 December 1962; A/Res. 2158 (XXI), 25 November 1966; A/Res. 2386 (XXIII), 19 November 1972.

but the equitable interest in the factual situation survives. This interest is described as an 'acquired right'.³⁵

It will be shown in a later chapter that in various disputed submarine areas, for instance in the Aegean Sea and China Sea, the disputants often grant concessions overlapping each others' claimed shelf. Unless and until their concession rights are guaranteed as being stable, foreign companies would be reluctant to engage in any offshore activities.

2.5 Clausula Rebus Sic Stantibus

There is a doctrine in customary international law that a party to a treaty may unilaterally invoke as a ground for terminating or suspending the operation of the treaty the fact that there has been a fundamental change of circumstances from those which existed at the time of the conclusion of the treaty. This is called the doctrine

35. There is no doubt that a change in the internal organisation of a state might affect the execution of an agreement so vitally as to bring into operation the clausula rebus sic stantibus. See, e.g., Paszthy v. Kasulakoff, A.D. 1919-42 (Supplementary Vol.) No. 41, and In re Tatarko, A.D. 1949, No. 110, which the District Court of Rotterdam cited the maxim forma regiminis mutata non mutatur civitas ipsa. For details see D.P. O'Connell, "Economic Concessions in the Law of State Succession", 27 BYIL (1950), p.943; idem, State Succession in Municipal Law and International Law, Vol. 1 (Cambridge U.P., 1967), pp. 304-52.

of clausula rebus sic stantibus.³⁶

The problem of a state's right to cease or limit its performance of the provisions of a treaty on the ground that circumstances have changed is an old one. Its practical importance may be exaggerated; but states dissatisfied with the status quo continue to regard it as a welcome device for escaping from burdensome treaties, while others fear it as a threat to stability and to their interests.

Professor Kelsen observed that the clausula rebus sic stantibus is in opposition to one of the most important purposes of the international legal order; that is, the purpose of stabilizing international relations.³⁷ Although this doctrine is a part of positive international law, it may not be invoked by a party as a ground for terminating

36. Things standing so; under the circumstances. The relevant maxim is Omnis conventio intellegitur rebus sic stantibus. In the Free Zones of Upper Savoy and the District of Gex Case, France, which invoked the doctrine of rebus sic stantibus, maintained that it does not permit any unilateral denunciation of treaty on the ground of a change of circumstances. Switzerland, however, disputed the existence in international law of any right to a party to a treaty to terminate it on the ground of changed circumstances, and gave as its reason, inter alia, that the doctrine of rebus sic stantibus does not apply to treaties creating territorial rights. 1932 PCIJ Series A/B, No. 46. Cf. PCIJ Series C, No. 58. Cf. S.M. Schwebel, "The Alsing Case", 8 ICLQ (1959), pp. 341-45; Fisheries Jurisdiction Case (U.K. v. Iceland), ICJ Reports, 1973, pp. 18-21. Separate Opinion of Judge Fitzmaurice, ibid., p.77. For details, see O.J. Lissitzyn, "Treaties and Changed Circumstances (rebus sic stantibus)", 61 AJIL (1967), pp. 895-922.

37. Hans Kelsen, Principles of International Law, 2nd ed. Revised by Robert W. Tucker (New York: Holt, Rinehart and Winston, Inc., 1966), p.498.

or withdrawing from a boundary treaty.³⁸ Boundary treaties, which were intended to define the limits of sovereignty, must be capable of enduring.³⁹ Thus, in the Beagle Channel Arbitration, the Tribunal recognised that 'pending arbitration in the event of a dispute, the boundary cannot be changed by the unilateral action of either Party: nor could a Party be permitted to adduce evidence in support of the existence of a right to do so'.⁴⁰ This view seems to correspond with

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38. Art. 62(2)(a) of the 1969 Vienna Convention on the Law of Treaties. It has entered into force on 27 January 1980. At the Vienna Conference on the Law of Treaties, a great majority of the states had endorsed the view that treaties establishing a boundary were an exception to the fundamental change of circumstances rule. II YBILC (1974), p.73, para. 417; II YBILC (1966), p.259, para. 11. Cf. I YBILC (1980), p.8-15, 209, para. 35.
39. Sir Humphrey Waldock's 1963 draft, Second Report of the Law of Treaties, II YBILC (1963), pp. 79-85, draft Art. 22; Art. 22 proposed by the Drafting Committee of the ILC on 28 June 1963, I YBILC (1963), p.249. The expression 'to fix a boundary' referred to the actual delimitation of frontiers and would exclude such cases as the cession of an island. I YBILC (1966), Pt. I, p.86, para. 16. For further discussion, see Egon Schwelb, "Fundamental Change of Circumstances", 29 Zao RV (1969), p.39, at pp. 54-59.
40. The Beagle Channel Award, p.106, para. 174 [*italics added*].

the Anglo-Norwegian Fisheries⁴¹ and Raptis v. South Australia⁴² Cases.

Customary international law, which is based upon the consistent practice of states, has always contained the principle that a change of sovereignty does not affect the status of those international boundaries. Thus, when Ethiopia incorporated Eritrea in 1952, the alignment between Eritrea and Ethiopia became 'internationalised' whilst the boundaries common to Eritrea on one hand, and French Somaliland and the Sudan on the other remained unaffected.⁴³

Moreover it is instructive to note that when an alteration occurs in rivers this does not necessarily alter its boundary. For example, in Handly's Lessee v. Anthony, Chief Justice Marshall held that wherever a river is a boundary between states, it is the main, the permanent

41. "The delimitation of sea areas has always an international aspect; it cannot be dependent merely upon the will of the coastal States as expressed in its municipal law. Although it is true that the act of delimitation is necessarily a unilateral act ... the validity of the delimitation with regard to other States depends upon international law". ICJ Reports, 1951, p.132. See above, Ch. 1.

42. "The territorial limits dividing the internal waters from the territorial sea should be determined in accordance with the prevailing rules of international law which are an important part of the world order". Raptis v. South Australia (1977), 15 ALR 223, at 262-63, per Murphy. See above, Ch. 1.

43. Since this is a question concerning state succession in international law, it may be described as the principle of continuity.

river, which constitutes that boundary.⁴⁴ Similarly, in Nebraska v. Iowa, it was laid down that when a boundary water-course suddenly abandons its old bed, for whatever reason - such as accretion or alluvio or erosion produced by natural causes - and follows another new course, the boundary remains unchanged in the centre of the old channel, even though the water does not run through it.⁴⁵ This was followed by the International Boundary Commission in the Chamizal Boundary Arbitration. It decided that the natural 'changes which have taken place in the river have not affected the boundary line which was established and marked in 1852'.⁴⁶ However, this is not a general rule. There are many treaties which state that the boundary will change with the alterations of the river.⁴⁷ It may be noted that the question of 'stability' has given many complications in the case of river boundaries.

44. (1820) 18 US (5 Wheat) 374. See also B.M. Ziegler, The International Law of John Marshall (Chapel Hill, The Univ. of North Carolina, 1939), p.58.
45. 14 US 359. Cf. Missouri v. Nebraska, 196 US 23. The doctrine of thalweg, in some cases, is of even stricter application. Once provincial boundaries are fixed by law they can only be altered by another law.
46. [1911] XI RIAA, p.316.
47. See, e.g., the 1908 Treaty between the U.K. and U.S.A. De Martens, Nouveau Recueil General, 3rd Ser., IV, p.191; the 1934 Agreement between the U.K. and Siam, ibid., XXX, p.107-9.

As boundary treaties are excluded from clausula rebus sic stantibus, it is submitted that the principle of stability in some way corresponds to the maxim pacta sunt servanda.

2.6 Practice of Judicial and Arbitral Tribunals

Sir Hersch Lauterpacht was of the opinion that the demands of stability and peace in international relations were more urgent than in private relations, and concluded that there is a special reason for subordinating on occasions the stringency of the proof of the requirement of good faith to considerations underlying the maxim quieta non movere.⁴⁸

2.6.1 South Australia v. Victoria

In the State of South Australia v. The State of Victoria,⁴⁹ the boundary between South Australia and New South Wales was by Act 4 & 5 Will. IV, c.95 and the Letters Patent issued under that Act defined to be the 141st meridian of East Longitude. In 1847, by the authority of the Governors of New South Wales and South Australia and with the knowledge and approval of the Secretary of State a line was demarcated on the ground as being the 141st meridian, but in 1869 it was

48. H. Lauterpacht, 'Regles generales du droit de la paix', 62 Recueil de Cours (1937-IV), p.333, English Trans. text in E. Lauterpacht (ed.), Hersch Lauterpacht International Law Collected Papers, Vol. I (Cambridge U.P. 1970), p.378; see also MacGibbon, op. cit., 31 BYIL (1954) p.152, n.1.

49. [1911] 12 C.L.R. 667.

discovered that the line of demarcation was in fact about two miles to the westward of that meridian. The 1847 line of demarcation had been proclaimed by the respective Governors as the boundary and was the de facto boundary thenceforward. In dealing with the dispute which had arisen in regard to the true boundary between the two States the Privy Council referred to the fixation of the boundary in 1847 and held that on the true construction of the Letters Patent it was contemplated that the boundary line of the 141st meridian of East Longitude should be ascertained and represented on the surface of the earth so as to form a boundary line dividing the two colonies, and that it therefore implicitly gave to the executive of the two colonies power to do such acts as were necessary for permanently fixing such boundaries. The Privy Council also held that

the material facts showed that the two Governments made with all care a sincere effort to represent as clearly as was possible the theoretical boundary assigned by the Letter of Patent by a practical line of demarcation on the earth's surface. There is no trace of any intention to depart from the boundary assigned, but only to reproduce it, and as in its nature it was to have the solemn status of a boundary of jurisdiction their Lordships have no doubt that it was intended by the two executives to be fixed finally as the statutable boundary and that in point of law it was so fixed.⁵⁰

It would thus be clear that the settlement of the boundaries which was held not to amount to an alienation in that case

had been made wholly on the basis of 'good faith',⁵¹ with reference to the principle quieta non movere.

2.6.2 Opinion of the PCIJ

International tribunals on several occasions have themselves subordinated the condition of good faith to the more pressing requirements of stability and order. The PCIJ in the following cases particularly confirmed this approach. In the Delimitation of the Polish-Czechoslovakian Frontier (Question of Jaworzina) Case⁵² and the Delimitation

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51. The notion of 'good faith' in relations between states may be considered in two main aspects: (i) as the condition precedent for the existence of an international legal order - in this sense the principle 'pacta sunt servanda' is fundamental, not just to the law of treaties, but to international law in general; (ii) as a principle extrapolated from municipal law (a 'general principle of law recognised by civilised nations') and appearing in certain specific legal contexts: in particular, in the law of treaties, not just as a general notion of obligation, but with important implications for creation of treaty obligations, interpretation and performance thereof; in particular, termination; also in the notion of 'preclusion' or 'estoppel'.
 52. 1923. PCIJ Ser. B, No. 8. In this case the PCIJ was requested to give an advisory opinion on the following points: Is the question of the delimitation of the frontier between Poland and Czechoslovakia still open, and, if so, to what extent; or should it be considered as already settled by a definitive decision? After reviewing the relevant facts, including the decision of the Conference of Ambassadors which was called upon to divide the Spisz Territory, the Court declared, inter alia, that the frontier line had been directly or indirectly fixed in a definitive manner throughout the whole region of Spisz by the decision of 28 July 1920 and that it was final. See above, Ch. 1.

of the Serbo-Albanian Frontier (Question of the Monastery of Saint-Naoum) Case,⁵³ the PCIJ insisted upon the finality of the decisions taken by the Conference of Ambassadors on the delimitation of their respective frontiers. In the Frontier between Turkey and Iraq (Mosul Boundary) Case,⁵⁴ the same Court asserted that the decision which was taken by the Council of the League of Nations constituted a definitive determination of the frontier between Turkey and Iraq. These cases show the reluctance of international tribunals in adjudicating frontier disputes to disturb the principle quieta non movere.

The same considerations of stability had been assessed by Max Huber in the Island of Palmas Arbitration. He decided to disregard effective occupation in a case where, after it had taken place, it had been discontinued and displaced by an effective and undisputed occupation. He held that

The Netherlands title of sovereignty, acquired by continuous and peaceful display of state authority during a long period of time going probably⁵⁵ back beyond the year 1700, therefore holds good.

53. 1924 PCIJ Ser. B, No. 9. See above, Ch. 1.

54. In the Mosul Boundary Case the PCIJ observed that Article 3 of the Treaty of Lausanne was intended to lay down (fixer) the frontier of Turkey from the Mediterranean to Persian and that the object of the article was to establish a continuous and definitive frontier. 1925 PCIJ Ser. B, No. 12. Cf. Ser. E. No. 2, p.140. See above, Ch. 1.

55. II RIAA, p.829, at p.869. In the Alaska Boundary Dispute (1903), the United States maintained that for more than sixty years after the 1825 Treaty, Russia, in succession to her the United States occupied, possessed and governed the territory around the heads of the inlets without any protest or objection, while Great Britain never exercised the rights or performed the duties of sovereignty there, or attempted to do so. The Alaska Boundary Tribunal Proceedings, Vol. I, p.29; USFR (1903), p. 543.

The pragmatic approach to discourage uncertainty and instability was also shown in the Legal Status of Eastern Greenland Case.⁵⁶ The Danish claim to sovereignty in the non-colonised parts of Greenland was based on acts no more extensive than legislation concerning navigation in the seas around Greenland, the regulation of fishing or hunting, the issue of permits to visit that area, and the conclusion of commercial agreements referring to the whole of Greenland. But Norway could not even point to similar general activities. The alternative before the PCIJ, if it had adhered to the rigid requirement of complete occupation, would have been to declare the area in dispute terra nullius and open it for competition - with all the ensuing uncertainty and confusion. Undoubtedly, any such decision would have been contrary to those principles of finality, stability and effectiveness of international relations which have characterised the work of the Court. Therefore, the Court refused to make such decisions.⁵⁷

2.6.3 Jurisprudence of the ICJ

The jurisprudence of the ICJ has consistently given priority to the need for 'stability' in territorial situations.⁵⁸

56. 1933, PCIJ Ser. A/B, No. 53, p.22.

57. Cf. Sir Hersch Lauterpacht, The Development of International Law by the International Court (London: Stevens & Sons, 1958), pp. 240-241.

58. For details, see Suzanne Bastid, "Les problèmes territoriaux dans la jurisprudence de la cour internationale de justice" 107 Recueil des Cours (1962-III), p.365, esp. at pp. 452-67, 469, 481. Professor Jennings found that 'the bias of the existing law is towards stability, the status quo, and the present effective possession; the tendency/

In the Case Concerning Sovereignty Over Certain Frontier Land (Belgium-Netherlands),⁵⁹ the Court was requested to determine whether the sovereignty over the disputed plots, i.e. Baarle-Duc and Baarle-Nassau,⁶⁰ belonged to Belgium or the Netherlands.⁶¹ Belgium relied on a Descriptive Minute⁶² in holding that sovereignty over the disputed plots belonged to her. The Netherlands, nevertheless, interpreted the status quo provision⁶³ as upholding the text of the Communal Minute

tendency of international courts is to let sleeping dogs lie. This is right, for the stability of territorial boundary must always be the ultimate aim...' Jennings, op. cit., p.70.

59. Perhaps more appropriately entitled the Zondereygen Case, ICJ Reports, 1959, p.209. For discussions, see Roger Pinto, "Chronique de Jurisprudence: Affaire relative a la Souverainete sur certaines parcelles frontalières (Belgique c. Pays-Bas). Arrêt du juin 1959", 87 Journal du Droit International (1960), pp. 238-49; Bastid, op. cit., 107 Recueil des Cours (1962-III), Ch. IV, pp. 452-67; J.H.W. Verzijl, The Jurisprudence of the World Court, Vol. II (Leyden: A.W. Sijthoff, 1966), pp. 353-58.
60. The two villages, the Dutch village of Baarle-Nassau and the Belgian village of Baarle Hertog, often shown on maps as if they were distinct entities, are really only one village. For details, see C. d'Olivier Farran, "International Enclaves and the Question of State Servitudes", 4 ICLQ (1955), p.294, at pp. 299-303.
61. ICJ Reports, 1959, p.211.
62. The Minute was signed on 22 March 1841. It stated under Section A, called 'Zondereygen', that 'Plots numbers 78 to 111 inclusive belong to the commune of Baarle-Nassau'. Ibid., p.213.
63. After the separation of Belgium from the Netherlands in 1839, the two States concluded a boundary treaty on 6 November 1842. Art. 14 provided: 'The status quo shall be maintained both with regard to the villages of Baarle-Nassau (Netherlands) and Baarle-Duc (Belgium)...' Ibid., p.214.

which did not exclude the disputed plots from her sovereignty. After an analysis of the records between 4 September 1841 and 4 April 1843 of the Mixed Boundary Commission, the Court stated that the work of delimitation had indeed been done on the basis of the maintenance of the status quo. When the Boundary Commission laid down an article in the Descriptive Minute of 1843 which purported to be transcribed word for word from the Communal Minute of 1841 and proceeded to attribute the disputed plots, it may be held that the Boundary Commission was actually intending to give a final ruling in accordance with the requirements of the status quo. The discrepancy between the texts of the Communal and the Descriptive Minute was therefore irrelevant. The Court held that sovereignty over the disputed plots belonged to Belgium.⁶⁴

Judge Lauterpacht, however, voted in favour of a decision determining the sovereignty over the disputed plots belonged to the Netherlands based on the principle quieta non movere. He said:

It has been contended that the uninterrupted administrative activity of the Netherlands was due not to any recognition of Netherlands sovereignty on the part of Belgium but to the fact that the plots in question are an enclave within Netherlands Territory and that, therefore, it was natural that Netherlands administrative acts should have been performed there in the ordinary course of affairs. However, the fact that local conditions have necessitated the normal and unchallenged exercise of Netherlands administrative activity provides an additional reason why, in the

64. ICJ Reports, 1959, pp. 217-22, 230.

absence of clear provisions of a treaty, there is no necessity to disturb the existing state of affairs and to perpetuate a geographical anomaly.⁶⁵

Factually, it was true that at the local level the plots had been treated since 1841 as belonging to Baarle-Nassau (the Netherlands). Administrative activities (for instance collection of taxes; registration of property titles and transfers thereof; sales of state property and a lawsuit over these properties in Dutch courts; the building and occupation of houses by Dutch nationals; registration of births, marriages, deaths, etc) in Baarle-Nassau have been carried out to a considerable extent without any opposition from Belgium.⁶⁶ It is worthwhile noting that in the

Beagle Channel Arbitration, the Tribunal found that:

The important point throughout is not whether Argentina was under a duty to protest against Chilean acts in order to avoid the loss of the islands because of unilateral acts performed outside the terms of the Treaty (which obviously could only be devoid of legal effect): the important point is that her continued failure to react to acts openly performed, ostensibly by virtue of the Treaty, tended to give some support to that interpretation of it which alone could justify such acts.⁶⁷

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65. ICJ Reports, 1959, pp. 230-32 [italics added]. See also E. Lauterpacht (ed) International Law: being the collected papers of Hersch Lauterpacht, Vol. 3 (Cambridge U.P., 1977), pp. 207-9.
 66. ICJ Reports, 1959, p.228. Belgium's reply was that it was quite unaware that tax had been collected by the Netherlands. Cf. Minquiers and Ecrehos Case, ibid., 1962, 6. MacGibbon, op. cit., 7 ICLQ (1958), p.469.
 67. Award of Her Britannic Majesty's Government pursuant to the Agreement for Arbitration (Compromiso) of a Controversy between the Argentine Republic and the Republic of Chile concerning the region of the Beagle Channel (London: HMSO, 1977), pp. 105-6, para. 172 [italics supplied]. See below, 3.4.1.

Judging from the Netherland's 'actual administration' at a local government level of the plots and the 'acquiescence' and 'estoppel' by Belgium in the Frontier Land Case, it is, in this context, the principle of quieta non movere which should be taken into account.

Disputed boundaries do not, as we shall see later, yield to simple delimitation on the basis of 'effectiveness' alone. For, as with territorial disputes, it is commonly the 'ineffectiveness' of administration by the claimants which is at the roots of the dispute. This is obvious in relatively isolated and unpopulated areas; but, as the Frontier Land Case shows, similar conflicts between claims by central government authorities, and acts by local authorities and assumptions by individuals along a boundary can occur even in one of the most densely populated parts of Europe. The decision, in effect, required the weighing of acts at local government level against acts at the central government level. It is evident that the acts of the central government overrode those of the local government.⁶⁸ It is the central government that represents the state as a subject of international law.⁶⁹ It would, moreover, be short-sighted

68. It is interesting to compare this point to the Sino-Indian Boundary Dispute in the area covered by the McMahon line which was signed at the local government level and was neither recognised nor ratified by the Central Government of China; in 1950, the British Foreign Secretary said: 'We have over a long period recognised Chinese suzerainty over Tibet but only on the understanding that Tibet is regarded as autonomous'. Hansard, H.C. Debs., Vol. 408, Col. 602: 6 November 1950. See above, Ch. 1.

69. Art. 34(1) of the Statute of the ICJ.

for any tribunal concerned with the delimitation of a boundary between two states to ignore the need for the boundary to be durable. 'Stability' in such cases may require something other than the confirmation of a territorial status quo.

In the Temple of Preah Vihear Case (Cambodia v. Thailand), the ICJ said:

when two countries establish a frontier between them, one of the primary⁷⁰ objects is to achieve stability and finality.

Various factors support the view that the purpose of frontier treaties is to achieve stability on a basis of certainty and finality. In spite of the ambiguities of the boundary demarcation in dispute, the Court emphasised that Thailand had:

for fifty years, enjoyed such benefits as the Treaty of 1904 conferred on her⁷¹, if only the benefit of a stable frontier.

In the Fisheries Jurisdiction Case (U.K. v. Iceland), Judge de Castro also invoked the principle of quieta non movere in his separate opinion. He said:

70. ICJ Reports, 1962, p.34 [italics added]. See above, Ch. 1.

71. Ibid., p.32. In the British Guiana Boundary Arbitration (1897) the parties agreed that adverse holding or prescriptions during a period of fifty years shall make good title. ²¹ Hertslets Commercial Treaties, p.1123. Cf. Her Majesty's Attorney-General for British Honduras v. John Bristowe and Charles Thomas Hunter (1880) L.R. 6 App. Cas. 143.

Along with the special interest and the preferential rights of the coastal state, account should be taken of the historic rights of the countries concerned with high sea fishing. The acquisition of rights over the sea by prescription is not admitted, but long usage should be respected, and that for the same reasons as for the interests of the coastal states. It is contrary to the concept of justice to disregard situations which have been established for years, the capital invested, the establishment of industries, the protein needs of populations, and above all the confidence inspired by a respect for the status quo concerning the use of the high seas as common property.⁷²

In the North Sea Continental Shelf Cases, Judge Ammoun expressed his separate opinion that:

The states which claim rights of [historic waters (gulfs, bays, etc), sedentary fisheries and preferential fishing zones], from the states of Latin America to those of Europe, Asia and Africa, rely ... on historic title or on regional custom, which could not and cannot be prejudiced by the establishment of the custom of the freedom of the high seas, by reason of the priority or effectiveness of the former; whereas rights over the continental shelf are considered to be exercised ipso jure, without aid of effectiveness.

These states can consequently avail themselves of the adage quieta non movere, and take shelter behind situations consolidated by time which have changed into rules of law, no longer admitting for the future of any possible protests. The feeling of society ... is in general favourable to the recognition of historic rights, whether such recognition be shown by the conduct of states, by judicial or arbitral decisions, or in the teaching of publicists ... the possibility is not excluded of similar legal situations coming⁷³ to birth by the normal operation of legal creation.

These cases provide ample evidence of the fact that judicial tribunals consider that one of the important functions of law including in its relation to boundaries is to preserve

72. ICJ Reports, 1974, pp. 98-99 [italics added]. See below, Ch. 4.

73. ICJ Reports, 1969, pp. 113-114.

the status quo. This is undoubtedly correct but is not the whole picture as recent cases show. In the North Sea Continental Shelf Cases and Anglo-French Continental Shelf Arbitration, 'stability' was related directly to an equitable solution, acceptable to the parties in both cases, giving prominence to the role of 'special circumstances' and other relevant factors.⁷⁴

Certainly the rules of positive international law are the expression of a temporary stabilisation of international boundaries. It has been repeatedly observed that the guiding concept in the jurisprudence of the arbitral awards, the PCIJ and ICJ in territorial and frontier cases, has been that of 'stability' or quieta non movere. It may therefore be submitted that the principle has already received the imprimature of the courts. All this shows that territorial boundaries are ipso jure the most stable of all institutions.

2.6.4 The Acquired Right: Local Government Level Versus Central Government Level

It has been pointed out that the requirements of 'stability' have not always been seen simply in terms of

74. ICJ Reports, 1969, pp. 50-51, para. 94; In the Anglo-French Continental Shelf Arbitration, the Court of Arbitration decided that equity required that the Channel Islands which are situated 6.6 nautical miles to the French coast should therefore be accorded only a 12 mile continental shelf, so that France could have sovereign rights beyond them to mid-channel. Miscellaneous No. 15 (1978), Cmnd. 7438. See above, 2.1.

conserving existing possession. In both the Frontier Land⁷⁵ and the Temple of Preah Vihear⁷⁶ Cases, the ICJ attached relatively little weight to actual possession of the disputed territory, adjudicating in favour of the dispossessed party. Since this was undoubtedly against the trend of arbitral awards, and indeed the jurisprudence of the PCIJ and the ICJ in the Eastern Greenland and Minquiers and Ecrehos Cases, it is worth examining the reasons for it.

If the Court's aim has been to 'stabilize' or to refrain from disturbing an established de facto sovereignty, it must still determine the lineaments of the de facto situation. That these may not be altogether unambiguous has been pointed out in the Minquiers and Ecrehos Case above. As we have seen, the Court in that case stressed the importance of actual exercise of 'state functions', e.g., local administration, local jurisdiction, and acts of legislative authority, as proving the continuous display of sovereignty necessary to confirm title. For this reason, upon the evidence as to long continued exercise of state functions by British authorities, the Court preferred the claim of the United Kingdom.⁷⁷ This same principle of the exercise of state activity on an adequate scale, as distinct from

75. ICJ Reports, 1959, p.209.

76. ICJ Reports, 1962, p.6. See above, Ch. 1, below Ch. 4.

77. ICJ Reports, 1953, pp. 68-70.

routine or inconclusive acts not necessarily evidencing a firm intention to establish territorial sovereignty, was also applied by the Court, in its Advisory Opinion on the Western Sahara Case.⁷⁸

In the Frontier Land and Temple of Preah Vihear cases, the nub of the factual problem confronting the Court was that the manifest attitudes of the parties at central and at local governmental levels had diverged over a fairly considerable period. Even granted that the guiding principle behind the Court's decisions on both cases was to 'stabilize' the situation, it had first to choose which situation to stabilise - that which had been maintained at local governmental level, or that apparently manifested over certain period of time at central governmental level. In both cases, the Court chose the latter.⁷⁹

Similar conflicts between acts by the central government and local acts on the ground were also manifested in the Rann of Kutch Arbitration⁸⁰ primarily in the form of the description in maps published by the official Survey of India

78. ICJ Reports, 1975, p.12.

79. In the Argentine-Chile Boundary Arbitration, Argentina sought to discredit much of Chilean evidence, especially those parts of it which depended upon the acts of local as opposed to central authorities, and even more those parts of it which reflect the conduct and sentiments of private individuals, XVI RIAA, p.109, at p.173.

80. 50 ILR (1976), p.2.

of the Kutch-Sind boundary as following the northern shore of the Rann. It appeared that British officials in Sind had treated the boundary as running through the middle of the Rann, and similarly, the acts of the Kutch authorities were confined for the most part to the southern half of the Rann. The arbitration resolved this conflict by means of a presumption in favour of the map boundary, rebuttable by evidence of acts on the ground to the contrary. Accordingly, Judge Lagergren, Chairman of the Tribunal said that:

In respect of those sectors of the Rann in relation to which no specific evidence in the way of display of Sind authority, or merely trivial or isolated evidence of such a character, supports Pakistan's claim, I pronounce in favour of India ... However, in respect of sectors where a continuous and for the region intensive Sind activity, meeting with no effective opposition from the Kutch side, is established, I am of the opinion ⁸¹that Pakistan has made out a better and superior title.

In respect of the two islets of the Rann in Pakistan territory, he made the following remarks:

The paramount considerations of promoting peace and stability in this region compels the recognition and confirmation that this territory, which is wholly surrounded by Pakistan territory, also be regarded as such ...⁸²

Even after full examination, there is room for doubt as to whether or not the presumption in favour of the central

81. Ibid., pp. 518-9. In this case the maxim in aequali jure melior est conditio possidentis (where the rights of the parties are equal, the claim of the actual possessor shall prevail) seems to have been applied. Plow. 296.

82. 50 ILR, p.520 [italics added].

government level was the more correct or even the more sensible approach, but in either case, the most interesting and significant feature of these judgments was not that they 'stabilised' a situation, but which situation they stabilised.

The problem before the Court can be put in a different way. The guiding concepts of 'stability' or quieta non movere might alternatively be put in terms of a search for a consensual frontier.⁸³ The frontier to be 'stabilised' is then the frontier to which both parties have either at some time explicitly consented, or to which they are deemed by their conduct to have consented. If the consensual boundary at local and central governmental levels differs, the Court must still determine to which consensual boundary to give effect. However, if the problem is put in terms of 'sovereignty' - which state is actually exercising sovereignty over the disputed territory - the question is still whether 'sovereignty' is to be equated with local administration or with the views and assumptions of the central government.⁸⁴

83. Cf. the approach of the Arbitral Tribunal in the 'Oeil de la Mer' (or Meerauge) Arbitration, 8 RDILC (1906), p.196.

84. In the Island of Palmas Arbitration, the question was whether the establishment of a special local administration was necessary to bring the tribal organisation effectively within the sovereignty of the Netherlands. Judge Huber held that the creation of a special administration in the Island was unnecessary and that it was enough if the Netherlands showed a 'continuous and peaceful display of actual power'. II RIAA, p.831.

It may be that the difficulty which the Court found in these cases in giving effect to acts of local authorities, arises from the present inability to fit such acts into convenient legal categories. It would, moreover, be short-sighted for any tribunal, concerned with the delimitation of a boundary, to be inflexible. The question of 'stability' has given rise to many complications, especially in relation to boundaries in rivers. Establishing 'stability' in such cases may require something other than the recognition and confirmation of a territorial status quo or quieta non movere. In practice, however, to apply the principle quieta non movere indiscriminately may equally produce injustice.⁸⁵ Although it is proper to emphasise the importance of 'stability' which is so great as to override other considerations, it is unrealistic to over-stress the stability of any specific boundary.

3. Principle of Effectiveness

It will be noticed that international judicial and arbitral tribunals have, when faced with territorial disputes, found little assistance in, and rarely discussed, the 'modes' of acquiring and losing sovereignty over territory, discussed by traditional writers. In fact, the major statements of principle to be found in international awards relating to land territory support the 'principle of effectiveness'.

85. See, for example, the Norwegian Reply in the Anglo-Norwegian Fisheries Case, ICJ Pleadings, 1951, Vol. III, p.462.

That is, they substantially equate the exercise of state functions with the possession of sovereignty. These statements of principles will be discussed later, but two points should nevertheless be noted. In the first place, on closer examination of the decisions in which those statements of principle are made, it will be found that even the 'principle of effectiveness' was applied with difficulty. Indeed, frequently, the major issue in a territorial dispute is which of two states is actually exercising state functions; for the disputes referred to arbitration, not unnaturally, concern remote and sparsely inhabited or entirely uninhabited areas in which the opportunity for exercising state functions is small. Secondly (and for a not dissimilar reasons), the 'principle of effectiveness' is inappropriate to, and has not been adopted in, decisions concerning maritime or submarine areas. In these latter cases, as will be seen, geographical, economic and strategic factors have predominated.⁸⁶

86. It must not be forgotten that the principle of effectiveness is also in private law a question of fact, and frequently, of legal fiction. For legal fiction, see Lon L. Fuller, Legal Fictions (Stanford U.P., 1967), Ch. 1; p.1; Jean J.A. Salmon, "Le Procédé de la fiction en droit international public", 10 Revue Belge de Droit International (1974), p.11.

3.1 Ex Factis Jus Oritur

One of the important aspects of the jurisdiction concept of sovereignty is shared with the 'possession' analogy. Both make the legal rights inherent in territorial sovereignty depend upon the factual exercise of governmental powers:

ex factis jus oritur.⁸⁷ The jurisdictional theory describes this as the principle of effectiveness. In Kelsen's words:

The exclusive validity of a national legal order extends, according to international law, just as far as this order is, on the whole, efficacious, that is, permanently applied, as far as the coercive acts provided⁸⁸ for by this order are actually carried out.

The territorial jurisdiction or sovereignty of the state extends in law as far as it extends in fact. There can be no 'abstract' right of sovereignty divorced from its exercise.

According to Kelsen, the acquisition and loss of territorial sovereignty is solely dependent on 'effectiveness'; whether a state effectively asserts and exercises governmental functions, as sovereign, over a territory, or fails to do so. There are, however, situations, notably where territory has been acquired by force, or where territory is administered under a lease, a mandate or trusteeship agreement, where it may be important to distinguish de jure sovereignty from mere de facto administration. Some of the other problems and inadequacies of this approach have been mentioned in the

87. 2 Co. Inst. 49. The law-creating influence of facts.

88. See Hans Kelsen, General Theory of Law and State, English Trans. by Anders Wedberg (Harvard U.P., 1946), p.213.

the context of the 'possession' analogy.⁸⁹ 'Effectiveness' justifies a territorial status quo; it is an obstacle to peaceful change or an invitation to the use of force. It gives legal title to the state which acquires territory by conquest or subjugation, but would make it impossible for an international judicial tribunal presented with a territorial dispute to make an award to a party other than the one in control.

3.2 Ownership and Possession

Normally the areas over which a state might claim dominium and imperium are co-extensive. They are what we think of as the territory of the state. Usually under its own municipal law the state will formally be the owner of a substantial area, if not the whole, of its territory. Thus, in feudal law, the proprietary rights of the individual in land are based on vassalage and derived from his feudal overlord.⁹⁰ The principle remains embodied in the common law: the basis of English land law is that all land in England is owned by the Crown. A small part is in the Crown's actual occupation; the rest is occupied by tenants holding the land either directly or indirectly from the

89. It is one thing to say that law is ultimately based on the facts of life and that it is a body of rules established by a system of force; it is another thing to say that breaches of law, if they are repeated and remain unpunished, become part of the legal order. Hersch Lauterpacht International Law Collected Papers, Vol. 1, p.342.

90. See S.F.C. Milsom, The Legal Framework of English Feudalism (Cambridge U.P., 1976), p.36.

Crown.⁹¹ Accordingly, it has been observed, sovereignty and property are indistinguishable concepts to the Anglo-American lawyer. British and American writers on international law have consequently regarded sovereignty over territory as a real right of property.⁹² The territory of the state was its 'international property'; the property of a state is marked by the same characteristics to other states, just as the property of individuals is relative to other individuals: in other words, it is exclusive of all foreign interference and susceptible to free disposition.

The meaning of possession is a visible possibility of exercising physical control over a thing, coupled with the intention of so doing. There are three requisites of possession. First, there must be actual or potential physical control. Secondly, physical control is not possession, unless accompanied by intention. Thirdly, the possibility and intention must be visible or evidenced by external signs, for if the thing shows no signs of being under the control of anyone, it is not possessed. Theory and practice agree upon the rule that the territory must really be taken into possession by the occupying state.⁹³

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91. Cf. J.G. Riddall, Introduction to Land Law, 2nd ed., (London: Butterworths, 1979), pp. 1 et seq. Cf. E.J. Schuster, The Principles of German Civil Law (Oxford: Clarendon Press, 1907), pp. 385-86.
 92. John Westlake, International Law (Cambridge U.P., 1910) Pt. 1, p.86; L. Oppenheim (ed) The Collected Papers of John Westlake on Public International Law (Cambridge U.P., 1914), Ch. IX, p.131.
 93. Jowetts Dictionary of English Law, 2nd ed., by John Burke (London: Sweet & Maxwell, 1977), Vol. 2, p.1387. Cf. R.W.M. Dias, "A Reconsideration of Possessio", 14 Cambridge L.J. (1956), pp. 235-47.

For this purpose it is necessary that it should take the territory under its sway (corpus) with the intention of acquiring sovereignty over it (animus).⁹⁴

The conception of territorial sovereignty as analogous to, even distinguishable from, the right of property of the individual in private law, did not resolve the problem of the nature of territorial sovereignty in international law. Although this analysis seemed attractive at first sight, it created more difficulties than it solved, because the private law of property is sophisticated and stable enough to admit of a variety of rights in land. More especially, it distinguishes the concepts of 'ownership'⁹⁵ and 'possession',⁹⁶ and possession in fact from possession in law.

3.2.1 Possession in Fact and Possession in Law

In municipal law, the issue whether factual control is to be recognised as constituting possession in law, as appropriate for legal protection under a right of action distinct from that available to the owner, arises in two diverse situations. First, when the 'possession in fact' is possession with the consent of the owner. Second, when

94. See, e.g., the Delagoa Bay Arbitration, 66 BFSP, p.554; Clipperton Island Arbitration, II RIAA, p.1105; Island of Palmas Arbitration, ibid., p.831; Eastern Greenland Case, PCIJ Series A/B, No. 53, p.22. See below, 3.4.1.

95. Ownership implies the complete dominion. Cf. Sec. 903, Bürgerliches Gesetzbuch.

96. Possession means 'the actual control' over the thing to which it refers. Sec. 854(1), Bürgerliches Gesetzbuch.

possession has been acquired without the consent of the owner, or after lawful possession, or otherwise relating to law. In both these situations, it must also be decided whether the de facto possession is to be protected as against third parties only, or as against the owner as well.

3.2.1.1 Possession with consent of territorial sovereign

In the first situation in international law, the issue whether a state in occupation of territory with the consent of the territorial sovereign - under a lease, for example - is entitled to protection of that possession as against a third state is perhaps of little significance. In municipal law the issue arises in consequence of restricted rights of procedure, and international law knows little of such technicalities. It is true, however, that the elaboration of the concept of locus standi or legal interest by the ICJ in the South West Africa (Second Phase)⁹⁷ and Barcelona Traction (Second Phase)⁹⁸ cases suggests that the issue might be raised as to whether a lessee state might bring an international claim for possession of territory raised by a third state independent of any claim which might be brought by the territorial sovereign. Conversely, it might

97. ICJ Reports, 1966, p.6.

98. ICJ Reports, 1970, p.3. The Court dismissed the action on the procedural ground that Belgium lacked jus standi, since its only interest in the case was through the shareholders in the company, and that it did not suffice to confer a right of diplomatic protection in this case.

be contended that a 'suzerain' state,⁹⁹ or territorial sovereign of territory ceded in perpetual occupation, had a nudum jus¹⁰⁰ insufficient to support a claim for possession from a third state. The interests of justice would suggest that technical losses should not be created where they are not clearly shown to exist.

The second aspect, whether the possession of a lessee state should be protected as against the claim of the territorial sovereign, or, perhaps more vitally, whether the lessee state is to be entitled to reclaim possession from the territorial sovereign, is of considerable significance. For in international law it is closely related to the significance attached to territorial sovereignty. It is arguable that the interests of the territorial sovereign relate so closely to the interests and perhaps the very survival of the state, that a discretion remains in the territorial sovereign - in law as clearly as it does in fact - to retake possession of territory held by another state under express or tacit agreement. In municipal law, excepting customary rights (e.g. rights of way etc.), most

99. Suzerainty may be defined as a relation between a dominant and a dependent state, the incidents of which are in part defined by treaty or agreement, and in part by lex specialis peculiar to that relation or that class of relations. It differs from protectorate only in that certain of its incidents are more likely to be undefined, or to involve general claims of supremacy. Although suzerainty is practically obsolete, the Indian Native States until 1947 were the obvious example. See The Creation of States in International Law, op. cit., pp. 209 et seq.

100. A naked law.

property rights short of absolute ownership are created for a term of years only; moreover, the existence of facilities for governmental regulation permit the modification of all property rights where that is deemed desirable. However, international agreements regarding territories are frequently couched in terms implying permanence, or at any rate their indefinite continuance, or perhaps simply provide no method for their examination appropriate to all circumstances. For some of these there are no ready 'legislative' means for the alteration of territorial rights. Indeed, it is remarkably difficult to determine precisely the relative rights of the 'possession' of territory and the territorial sovereign. Consider, for example, the following cases: the relative rights of the United States and Panama in the Panama Canal Zone;¹⁰¹ the United States and Cuba in the

101. See generally, T.J. Lawrence, Essays on Some Disputed Questions in Modern International Law, 2nd Rev & Enlarged (Cambridge: Deighton, Bell & Co., 1885), pp. 41-88, 89-162; E.R. Johnson, 'The Panama Canal: The Title and the Concession', XVIII Pol. Sci. Quart. (1903), p.197; H.S. Knapp, 'The Real Status of the Panama Canal as Regards Neutralization', 4 AJIL (1910), p.304; Harmodio Arias, The Panama Canal (London: P.S. King & Son, 1911); G.C. Butte, Great Britain and the Panama Canal: A Study of the Tolls Question (Heidelberg, 1913); L. Oppenheim, The Panama Canal Conflict between Great Britain and the United States of America, 2nd ed. (Cambridge U.P., 1913); 26 BDIL, pp. 281-338; R.R. Baxter, The Law of International Waterways, With Particular Regard to Interoceanic Canals (Harvard U.P., 1964), pp. 71-72, 74-84, 288; E.C. Hoyt 'Law and Politics in the Revision of Treaties Affecting the Panama Canal', 6 Virginia J.I.L. (1965-66), p.289; M.D. Simpson, 'Panama: The Proposed Transfer of the Canal and the Canal Zone by Treaty', 5 Georgia J.I.C.L. (1975), p.195; Hans Smit, 'The Panama Canal: A National or International Waterway?' 76 Columbia L.R. (1976), p.965; C.A.L. Guevara and M.J. Shay, 'The Panama Canal: A/

Guantanamo Bay;¹⁰² the United Kingdom and Cyprus in the sovereign base area.¹⁰³ Also it may be asked whether some rights of territorial sovereignty were going beyond a right of pre-emption (the application of which itself involves some complexities) - reserved to Spain over Gibraltar under

A Minisymposium', 9 NYUJILP (1976), p.1; 'Treaty Concerning the Permanent Neutrality and Operation of the Panama Canal', 16 ILM (1977), p.1040; 'Panama - U.S.: The Panama Canal Treaties and Related Documents', ibid., pp. 1021 et seq. See also 19 Harvard I.L.J. (1978), p.279; Walter la Feber, The Panama Canal: The Crisis in Historical Perspective (New York: Oxford U.P., 1978).

102. See generally, Joseph Lazar, 'International Legal Status of Guantanamo Bay', 62 AJIL (1968), p.730; idem, '"Cession in Lease" of the Guantanamo Bay Naval Station and Cuba's "Ultimate Sovereignty"', 63 ibid (1969), pp. 116-18; Cf. G.L. Maris, "Guantanamo: No Rights of Occupancy", ibid., pp. 114-16.
103. In reply to questions as to the deployment of rockets and nuclear weapons within the British sovereign base area in Cyprus, the Minister of Defence said: 'The essence of a sovereign base area is that we can deploy such weapons as we think fit at such time as we think fit...' BPIL (1963-I), pp. 2-3. Cf. Treaty of Guarantee between Cyprus, Greece, Turkey and the United Kingdom of 1960, 382 UNTS, No. 5475, p.3; see also the Treaty concerning the Establishment of the Republic of Cyprus of 1960, ibid., No. 5476, p.10. 'Her Majesty's Government consider that the 1960 Cyprus settlement is an international treaty which can only be altered by mutual agreement'. See BPIL (1965-I), p.67. Cf. ibid (1964-II), p.243.

the Treaty of Utrecht?¹⁰⁴ The mandate and trusteeship agreements also raise problems regarding the relative rights of the administering power and the supervisory authority.¹⁰⁵ Agreements or customs regarding the use of territory, such as neutralisation of territory¹⁰⁶ and rights of passage,¹⁰⁷ also raise problems regarding the relative rights and interests of the territorial sovereign and those states interested in perpetuating the agreement of motion concerned.

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104. Art. X of the Treaty of Utrecht of 1713 in Documents on Gibraltar, presented to the Spanish Cortes by the Minister of Foreign Affairs (Non-official translation) (Madrid, 1965), pp. 16, 155. See also W.C. Abbott, An Introduction to the Documents Relating to the International Status of Gibraltar, 1704-1934 (New York: MacMillan Co., 1934); Cf. Resolution Relating to the Scheme of Observation of the Spanish Frontiers by Land and Sea during Spanish Civil War, 31 AJIL Suppl. (1937), p.163. Cf. BPIL (1965), pp. 35-38. UN Doc. A/Res. 2231 (XVI); Question of Gibraltar, December 20, 1966. BPIL (1966), p.208; ibid (1967), pp. 75-79. 2b BDIL, pp. 748-49; Gibraltar Talks with Spain, May-October 1966, Miscellaneous No. 13 (1966) Cmnd. 3131; Oliver Pritchett, 'How Safe is Gibraltar?' The Sunday Telegraph, November 4, 1979, pp. 8-9. For Lisbon Agreement between Britain and Spain on the future of Gibraltar, see The Daily Telegraph 29 January 1981, p.10.
105. See E. Lauterpacht, 'The Contemporary Practice of the U.K. in the Field of International Law - Survey and Comment, VIII', 9 ICLQ (1960), pp. 257-58; Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) Notwithstanding Security Council Resolution 276 (1970), ICJ Yearbook (1970-71), No. 25, p.100.
106. The neutralization of specific territories, such as Austria, Belgium and Switzerland, was aimed at preventing them becoming areas of war. It was often, but not necessarily, accompanied by demilitarization, which implied a permanent deprivation of fortifications and military forces, a status which was not necessarily accompanied by neutralization. See J.H.W. Verzijl, International Law in Historical Perspective, Pt. IX-B (Sijthoff & Noordhoff, 1979), p.21.

3.2.1.2 Possession without consent of territorial
sovereign

There are three major substantially distinct situations in which a state may be in possession of territory under the sovereignty of another state. First, a state may be in possession as a result of the manifest use of force. This situation is generally discussed by writers under the head of the validity of title acquired by conquest. Secondly, a state may be in possession of territory as a result either of peaceful occupation without the actual use of force - although perhaps with an implied threat of its use - or simply as a result of peaceful encroachment (perhaps indeed in good faith), or it may be a territory under the sovereignty of another state. Thirdly, territory may pass out of the actual possession of a territorial sovereign in a manner unlawful under its municipal public law, for instance, as a result of revolt and secession. Although these three situations are distinguishable, in practice they will inevitably overlap. There is really no clear dividing line between the occupation of territory by force and that occupation which is the result of peaceful penetration.

107. Cf. Case concerning Right of Passage over Indian Territory (Portugal v. India), ICJ Reports, 1960, p.6. Cf. E. Lauterpacht, 'Freedom of Transit in International Law', 4 Transactions of the Grotius Society (1958 and 1959), p.313.

It has customarily been accepted that military occupation of territory does not confer sovereignty, although it does, of course, confer the right, and indeed the duty, of administration. Accordingly, annexation of territory *durante bello* is ineffective. This is, naturally, independent of the issue whether territory occupied in consequence of the use of force may be validly annexed at any time.

In face of these examples, it appears impossible to maintain that sovereignty is inseparable from actual possession of territory. Nonetheless, this doctrine is not only regularly maintained but in one form or another, has been fashionable over a considerable period of time. The reasons usually given are the requirements of international order: the need for 'stability' of territorial situations, the discouragement of self-help, and the inadequacies of the international judicial system.

3.2.2 Concepts of Ownership and Possession

Means of assessing the above notions vary in different legal systems. These distinctions are important, at least, in two ways. First, 'ownership' is capable of existing as an 'abstract right' divorced from 'factual possession'.¹⁰⁸

108. Where one state has acquired the right to administer a portion of the territory of another in such circumstances that all or virtually all governmental authority is vested in the former state, though without that state acquiring sovereignty, a jus in re aliena in strictness arises. For instance, by the Convention of 4 June, 1878 Cyprus was assigned by Turkey 'to be occupied and administered by England'. See Hertslet's Commercial Treaties, Vol. XIV, p.1170.

'Possession', moreover, may be a more sophisticated concept from simple holding, the factual occupation of land - possession in fact. Such possession is not necessarily recognised by the law, and consequently an 'abstract' right of possession may also be recognised - possession in law. Secondly, acquisition and transference of ownership is a relatively formal process; possession is acquired informally by the simple acquisition of effective control, even if that control is not deemed sufficient to confer legal possession. Consequently, it is necessary for international law to determine whether or not an abstract right of sovereignty, divorced from actual manifestations of control over territory, is to be recognised; and also to determine the means by which territorial sovereignty is acquired.

It must, of course, always be borne in mind that in practice municipal legal systems may either pay little regard to ownership divorced from possession, or, whatever their theoretical starting point, they may be compelled to face the fact of possession and to protect the possessor against the owner by means of concepts such as the limitation of rights of action or extinctive and acquisitive prescription.¹⁰⁹ Even wrongful possession may in time confer a good title.¹¹⁰

109. English medieval law knows no acquisitive prescription for land; all it knows is a limitation of actions.

110. Art. 4(a) of the Treaty of Washington of 1897 provides: 'Adverse holding or prescription during a period of fifty years shall make a good title'. See Stuyt, op. cit. No. 207, p.213. Cf. Temple of Preah Vihear Case, ICJ Reports, 1962, p.6.

These are questions of practical legal policy which the international, like any other legal system, must face.

If we now accept that international law acknowledges, in the form of the concepts of territorial sovereignty and administration or control of territory, analogies to the municipal law concepts of both ownership and possession, we must further consider what legal consequences should be drawn from these analogies. First of all, it is clear that although ownership and possession are distinguishable, they are also closely linked.¹¹¹ Possession is the basis for the modes of acquisition of property: by occupation and natural accession.¹¹² In every acquisition of possession there is a physical act, corpus, accompanied by an act of will, animus.¹¹³ Thus, possession in international law is

111. Roman law regarded dominium and possessio as quite distinct conceptions. Dominium denoted primarily a right, which might or might not connote the fact of physical control. Possessio primarily denoted the fact of physical control. It had, as such, no legal consequences, and was therefore totally distinct from dominium. Holdsworth, A History of English Law, Vol. VII (London: Methuen & Co., Sweet & Maxwell, 1966), p.458; Fischer Williams, op. cit., 7 BYIL (1926) p.38.
112. Possession in English law is prima facie evidence of ownership. Holdsworth, op. cit., Vol. VII, p.478.
113. See Von Savigny's Treatise on Possession, 6th ed., English trans. by Sir Erskine Perry (London: S. Sweet, 1848), Bk. II, Sec. XIV, p.142. Savigny held that animus required for possession was the intention of ownership, for which modern jurists commonly use the term animus domini, not found in the ancient texts.

also the exercise of power and will in and from a territory.¹¹⁴ Sovereignty over newly-discovered lands can be acquired by taking the most real and positive possession. Under contemporary international law, mere 'seizure with the eyes' is insufficient.¹¹⁵

However, apart from historical possession in the form of uti possidetis¹¹⁶ and prescription,¹¹⁷ some agreements explicitly exclude actual present possession from consideration unless it fulfils certain conditions. For instance, the Guatemala-Honduras Convention of 1895 provides that:

Possession shall only be considered valid so far as it is just, legal, and well founded, in conformity with general principles of equity, and with the rules of justice sanctioned by the law of nations.¹¹⁸

Possession becomes continuous by the continuance of corpus and animus by which it was originally acquired; but it is very evident that the same immediate physical control is not

- 114. Cf. the Eastern Greenland Case, PCIJ Series A/B, No. 53, pp. 45-46. See below, 3.4.1.
- 115. Cf. Island of Palmas Arbitration, II RIAA, p.829. In contrast, in the Clipperton Island Arbitration, where the island was uninhabited, physical and continuing occupation was not required as a condition of possession. Ibid., p.1108. Similar reasoning is found in the Eastern Greenland Case, PCIJ Ser. A/B, No. 53.
- 116. As you possess, so you shall continue to possess.
- 117. Where a right, immunity or obligation exists by reason of lapse of time.
- 118. Art. 6, 87 BFSP, p.530. See also Stuyt, op. cit., No. 185, p.191 [italics added]. See also No. 184 (Honduras-Salvador), p.190; No. 249 (Bolivia-Peru), p.256.

necessary to continue the possession, as was required to give rise to it; and continuing possession depends rather on the constant power which exists of reproducing the original relation at will. For this reason, possession is not lost by mere absence from the subject which was once appropriated.¹¹⁹ Moreover, as Max Huber observed, municipal law, while recognising abstract rights of property, nevertheless 'limited their effect by the principles of prescription and the protection of possession'.¹²⁰

It must also be noted, however, that the concept of possession is in some respects more complex than that of ownership. In a non-technical sense, possession may simply be defined as the actual holding or occupation of a thing. But if possession is to be protected by law, further problems arise. Should all possessions, whoever be the possessor and by whatever means possession was obtained, be protected, and against whom? What factual elements of holding or occupation are to constitute possession in law? As well as this, if it be accepted that possession in fact is not for all purposes to be treated as possession in law, further legal concepts need to be brought into play. So, just as we have the concept of ownership divorced from actual possession, we also need the concept of legal possession

119. See below, Ch. 4.

120. Island of Palmas Arbitration, II RIAA, p.839. Cf. Clipperton Island Arbitration, ibid., p.1108.

divorced from actual possession. And when it is desired to protect the de facto possessor against some, but not all, possible claimants, the notion of concurrent rights to possess of differing degrees of weight may be needed.¹²¹

In order to acquire title to sovereignty, it is crystal clear that the following conditions must be fulfilled.

First, the taking of possession must be carried out with the intention of establishing or manifesting sovereignty (a titre de souverain).¹²² A state must be willing to maintain order, organisation and the administration of justice. Secondly, possession must be taken with effective action, that is, a state must bring the territory under its control and administration. Thirdly, possession must be peaceful and uninterrupted.¹²³

121. See above, 3.2.

122. An important dictum of the PCIJ in the Eastern Greenland Case was the requirements of 'the intention and will to act as sovereign'. PCIJ Ser. A/B, No. 53, pp. 45-46. See below, 3.4.1.

123. Max Huber in the Island of Palmas Arbitration refers to 'continuous and peaceful state authority'. II RIAA, p.869. Cf. The Eastern Greenland Case. In the Chamizal Boundary Arbitration, the Commissioners were of the opinion that possession must be peaceful to provide a basis for prescription. XI RIAA, p.317. See above, 2.5.

3.3 Possession, control and jurisdiction

Terms like 'possession', 'control', 'jurisdiction' and 'effectiveness' are clumsy concepts to apply to complex territorial regimes. They fail to distinguish situations in which governmental functions are exercised with the intention of establishing or manifesting sovereignty (*à titre du souverain*) from those in which they are exercised by some other title. For instance, a state may be 'in possession' of territory by virtue of an international lease or concession,¹²⁴ military occupation,¹²⁵ mandate or trusteeship,¹²⁶ and in consequence exercise governmental functions in that area without at any time claiming sovereignty.

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124. See generally, Westlake, op. cit., pp. 136-37; D.P. O'Connell, International Law, Vol. I (London: Stevens & Sons, 1970) pp. 328-30; H. Lauterpacht's Collected Papers, Vol. I, pp. 372-73; J.G. Starke, Introduction to International Law, 8th ed., (London: Butterworth, 1977), p.183; Ian Brownlie, Principles of Public International Law (Oxford: Clarendon Press, 1979), pp. 115-16. See above 2.4.
125. McNair and Watts, The Legal Effects of War (Cambridge U.P., 1966), Ch. 17, p.366; Georg Schwarzenberger, International Law as Applied by International Courts and Tribunals, Vol. II (London: Stevens & Sons, 1968), Chs. 25-29, pp. 316-55; Marjorie M. Whiteman, Digest of International Law, Vol. 10 (Dept. of State Publ., 1968), p.540; J.H.W. Verzijl, International Law in Historical Perspective, Pt. IX-A (The Netherlands: Sijthoff & Noordhoff, 1978), p.209.
126. See generally, Norman Bentwich, The Mandates System (London: Longmans, Green & Co., 1930), esp. Ch. 1, p.1; Benjamin Gerig, The Open Door and the Mandates System (London: George Allen & Unwin, 1930), Ch. V, p.106; Charmain Edwards Toussaint, The Trusteeship System of the United Nations (London: Stevens & Sons, 1956). Cf. The Case Concerning the Northern Cameroons, ICJ Reports, 1963, p.15; The Namibia Case, ICJ Reports, 1971, p.16.

In Texaco v. Libyan Arab Republic,¹²⁷ Libya abstained from the proceedings. It did, however, raise certain objections, inter alia, that Libya's nationalisation of the assets of foreign oil companies was 'an act of sovereignty' which could not be judged by jurisdictions other than those of the state concerned.¹²⁸ The possible justification of the nationalisation thus lay in the 'lessor' state's sovereignty. Although the Tribunal accepted the basic right of the lessor state to nationalise, it did not accept that this was an unlimited right in respect of an international concession with a foreign contracting party,¹²⁹ since Libyan law and international law recognised that the sovereign could be bound by agreements, the making of which was an exercise of sovereignty.¹³⁰ States have an absolute right to control their natural resources, and so the Court was not able to recognise the principle of sovereignty over natural resources as a standard of jus cogens which overrode agreements.¹³¹

127. 53 ILR (1979), pp. 393, 422. See above, 2.4.

128. It was in a memorandum attached to a letter of 26 July 1974 by the Libyan Government to the President of the ICJ. See 53 ILR (1979), p.418.

129. 53 ILR (1979), p.468 et seq.

130. The Concession was governed by and interpreted in accordance with the principles of the law of Libya common to the principles of international law. Clause 28 of the Deeds of Concession. 53 ILR (1979), p.450.

131. Ibid., pp. 479, 482 et seq. For Jus cogens, see Jerzy Sztucki, Jus Cogens and the Vienna Convention on the Law of Treaties: A Critical Appraisal (Wien New York: Springer-Verlag, 1974); Ian McTaggart Sinclair, The Vienna Convention on the Law of Treaties (Manchester U.P., 1973), p.150; George Schwarzenberger 'International Jus Cogens?' 43 Texas LR (1965), p.455. Cf. the United Nations General Assembly Declaration on Permanent Sovereignty over Natural Resources, UN DOC. A/Res. 1803 (XVII), 14 December 1962.

Moreover, for the question of permanent sovereignty, the Tribunal observed that:

The state granting the concession retains the permanent enjoyment of its sovereign rights; it cannot be deprived of the right in any way whatsoever; the contract which it entered into with a private company cannot be viewed as an alienation of such sovereignty but as a limitation, partial and limited in time, of the exercise of sovereignty.¹³²

The general situation in which a state asserts jurisdiction over nationals outside its territory is explained as an 'interpenetration of competences' by virtue of the interaction of personal and territorial jurisdiction. Leases (or concession) and military occupation are simply treated as exceptions to the general rule that a state cannot legally perform acts on the territory of another state. The case of the international lease or concession in which 'sovereignty' is vested in the 'lessor' state, while administration and control might rest with the 'lessee' state party¹³³ is explained as a transfer of 'actual local

132. 53 ILR (1979), pp. 481-82, para. 77. The Arbitrator declared that in entering into concession contracts with the plaintiffs, the Libyan State did not alienate but exercised its sovereignty and ensured that it would not be affected in principle, the limitations accepted by it in respect of exercise of certain of its prerogatives having been accepted only in particular areas and for a specific period of time. Ibid., p.482, para. 78. See above, 2.4.

133. See e.g., Art. 3 of the Convention signed on 6 March 1898 which provides that China 'will abstain from exercising rights of sovereignty in the ceded territory [both sides of the entrance to the Bay of Kiao-Chau] during the term of the lease [ninety-nine years]'. Blue Book China No. 1 (1899), p.69. Extract from the Reichsanzeiger of April 29, 1898. Cf. the 1898 Convention for the Lease of Kuang Chou Wan. 4 AJIL Suppl. (1910), p.293.

competence' with a reservation of 'potential local competence'. Clearly, such situations can be expressed in terms of jurisdiction or competence; whether they are illuminated by this terminology is more doubtful.

It is true that a state is generally regarded as sovereign over that territory in which it exercises the ordinary functions of the state. The limits of state territory can normally be ascertained by reference to the limits of the effective possession, control, or jurisdiction of the state. But there are, admittedly, situations in which 'sovereignty' is not coterminous with possession, control or jurisdiction over territory. Possession, control or jurisdiction are not conclusive indicia of sovereignty. Accordingly, the 'principle of effectiveness' may be one, but it cannot be the sole criterion for attributing sovereignty over territory. Nevertheless, the principle of effectiveness, like the concept of 'possession', finds support not only among writers, but also in the practice of international judicial and arbitral tribunals as illustrated by the following cases.

3.4 Practice of Judicial and Arbitral Tribunals

3.4.1 Land Areas

The major statements of principle regarding sovereignty over land areas are to be found in Max Huber's well-known award in the Island of Palmas Arbitration,¹³⁴ the decision of

134. II RIAA, p.831.

the PCIJ in the Legal Status of Eastern Greenland Case,¹³⁵
 and the decisions of the ICJ in the Minquiers and Ecrehos,¹³⁶
 and Western Sahara (Advisory Opinion)¹³⁷ Cases, as well as
 by Judge Lagergren in the Rann of Kutch Arbitration.¹³⁸
 It will be convenient first to discuss the statements of
 principle, and then to examine their application to the
 facts of these disputes.

In the Island of Palmas Arbitration, Max Huber said
 that 'boundaries of lands were necessarily determined by
 the fact that the power of a state was exercised within
 them, so too, under the reign of international law, the
 fact of peaceful and continuous display is still one of the
 most important considerations in establishing boundaries
 between states'.¹³⁹ He started from the compromis that
 'sovereignty in relation to a portion of the surface of the
 globe is the legal condition necessary for the inclusion of
 such portion in the territory of any particular state',¹⁴⁰
 and arrived at the conclusion that 'the actual continuous

 135. PCIJ Ser. A/B, No. 53, p.22. See above, 2.6.2.

136. ICJ Reports, 1953, p.47. See above, 2.6.3.

137. ICJ Reports, 1975, p.3.

138. 50 ILR (1976), p.2. See above, 2.6.4.

139. II RIAA, p.839.

140. Ibid., p.838.

and peaceful display of state functions is in case of dispute the sound and natural criterion of territorial sovereignty.'¹⁴¹

Judge Huber's approach has been substantially endorsed by writers, by the decisions in the Eastern Greenland, Minquiers and Ecrehos and Western Sahara Cases, and by Judge Lagergron in the Rann of Kutch Arbitration. It is, however, in some respects an extreme view, and has not in all respects been followed by international tribunals, as the decisions concerning prescription which will be discussed in Chapter 3 below have shown. His approach is therefore worth examining in more detail. He begins with a definition of sovereignty:

Sovereignty in the relation between states signifies independence. Independence in regard to a portion of the globe is the right to exercise therein, to the exclusion¹⁴² of any other state, the functions of a state.

However, although initially defining territorial sovereignty in terms of the 'right to exercise ... the functions of a state', with regard to any given territory, he then goes on to make the existence of this right conditional on its actual exercise:

If a dispute arises as to the sovereignty over a portion of territory, it is customary to examine which of the states claiming sovereignty possesses a title - cession, conquest, occupation etc., superior to that which the other state might possibly bring forward against it. However, if the contestation is based on the fact that the other party has actually displayed

141. Ibid., p.840.

142. Ibid., p.838.

sovereignty, it cannot be sufficient to establish the title by which territorial sovereignty was validly acquired at a certain moment; it must also be shown that the territorial sovereignty has continued to exist and did exist at the moment which for the decision of the dispute must be considered as critical. This demonstration consists in the actual display of state activities, such as belongs only to the territorial sovereign.

Titles of acquisition of territorial sovereignty in present day international law are either based on an act of effective apprehension, such as occupation or conquest, or, like cession, presuppose that the ceding and the cessionary Power or at least one of them, have the faculty of effectively disposing of the ceded territory. In the same way natural accretion can only be conceived of as an accretion to a portion of territory where there exists an actual sovereignty capable of extending to a spot which falls within its sphere of activity. It seems therefore, natural that an element which is essential for the constitution of sovereignty would not be lacking in its continuation. So true is this, that practice, as well as doctrine, recognises ... that the continuous and peaceful display of territorial sovereignty (peaceful in relation to other States) is as good as a title.¹⁴³

It is clear from this passage that Huber, like Kelsen and other modern writers on the law of territory, laid primary weight on the concept of 'effectiveness'. But although it is common for writers to designate 'effectiveness' as the major factor in determining whether territory has been acquired, and to emphasise the importance of recognising 'effectiveness' as a means of imposing territorial stability, Huber is perhaps the only writer who has not shrunk from drawing the conclusion that 'effectiveness' is necessary also to the maintenance of territorial sovereignty, and that

143. Ibid., pp. 838-39 [italics added].

loss of effective control may involve loss of territorial sovereignty.¹⁴⁴ And this aspect of the principle of effectiveness has met with considerable criticism. It may however be remarked that in the very context of the Island of Palmas Arbitration, Huber found the utmost difficulty in determining whether either party had fulfilled the requirement of both effective apprehension of the territory and of continued effective control. This problem indeed illustrates the difficulty of applying the theory to resolve certain types of territorial or boundary dispute in which the 'effectiveness' of administration by one party or another is the very matter in dispute. Indeed, it is not entirely clear whether Huber would have applied this principle in the face of clearly delimited or demarcated boundaries, or seated boundaries, or if there were some clear title by 'cession, conquest, occupation etc.' The reasons which he gives for emphasising the need to 'display State activities' within the territory suggest that, in principle, he would not, although conceding that states may bind themselves to respect a conventional boundary unsupported by manifestations of sovereignty.

144. Professor MacGibbon points out that 'effectiveness is necessary for the maintenance of title by occupation' 'failure to protest against competing acts of sovereignty, openly performed, might suffice to indicate that the requisite degree of effectiveness in maintaining the title was not being shown'. I.C. MacGibbon, op. cit., 31 BYIL (1954) p.168. Cf. idem, "Some Observations on the Part of Protest in International Law", 30 ibid., (1953), p.293.

Thus, he founded his approach on two bases:

First, territorial sovereignty, as the exclusive right to display the activities of a state, has a corollary duty:

the obligation to protect within the territory the rights of other states, in particular their right to integrity and inviolability in peace and in war, together with the rights which each state may claim for its nationals in foreign territory. Without manifesting its territorial sovereignty in a manner corresponding to circumstances, the state cannot fulfil this duty.¹⁴⁵

Secondly, sovereignty is not an abstract right capable of existing without concrete manifestations;

Although municipal law, thanks to its complete judicial system, is able to recognise abstract rights of property as existing apart from any material display of them, it has none the less limited their effect by the principles of prescription and the protection of possession. International law, the structure of which is not based on any super-state organisation, cannot be presumed to reduce a right such as territorial sovereignty, with which almost all international relations are bound up, to the category of an abstract right, without concrete manifestations.¹⁴⁶

Certainly both these arguments, whether or not valid in themselves, would support a view that territorial sovereignty was lost by failure to display it, even when the actual display of state functions had been usurped by force or was in contravention of international agreements. This problem did not arise as such from the facts of the Island of Palmas Arbitration. There the United States claimed sovereignty under a treaty of cession from Spain, but, in substance,

145. II RIAA, p.939.

146. Ibid.

Huber held that Spain did not possess territorial sovereignty at the date of the purported cession and, indeed, had never possessed more than at best an 'inchoate title' by discovery (as a claim to establish sovereignty by effective occupation which, as he held, was never in fact done).¹⁴⁷ It is evident that the maxim nemo potest plus juris ad alium quam ipso habet¹⁴⁸ or nemo date qui non habet¹⁴⁹ applied. However, it is possible for a state which has acquired an 'inchoate title' by cession to perfect that title by the appropriate acts and thereby acquire by action subsequent to the cession a better title than that of the cessionary state. In this connection, it is important to note that the mode of 'cession'

147. Ibid., pp. 866-69.

148. Co. Litt. 309. No one can transfer a greater right to another than he himself has. Cf. in Lighthouses in Crete and Samos [1937] PCIJ Ser. A/B No. 71, the Court held that the lighthouses in Crete and Samos are lighthouses situated in territories which were assigned to Greece after the Balkan wars.

149. Jenks, Cent. 250. No one gives who possesses not. In the Frontier Land Case, a draft Convention was signed by the plenipotentiaries of Belgium and the Netherlands in 1892, in which Belgium agreed to assign the two disputed plots, i.e. Baarle-Nassau and Baarle-Duc, to the Netherlands. The Court observed that: 'the unratified Convention of 1892 did not ... create any legal rights or obligations, but the terms of the Convention itself and the contemporaneous events show that Belgium at that time was asserting its sovereignty over the two plots...' ICJ Reports, 1959, p.229. See above, 2.6.3. In the course of debate on the Aden, Perim and Kuria Muria Bill an amendment was proposed in 1967 for the purpose of excluding Perim from the Bill and for empowering the Government to lease the island to the UN to be administered as a trust territory. The Foreign Secretary commented on this proposal: 'How does one lease anything unless one has the ownership of it?... One cannot lease something unless one retains ownership'. Hansard, H.C. Deb., Vol. 749, Cols. 641-42: 28 June 1967.

cannot legally apply to sea areas; as Schucking rightly observed:

the cession [of the territorial sea], for example, of this area of dominion to another state, without the simultaneous cession of the coastal territory, cannot be regarded as legally possible. The intimate connection between the two precludes such a proceeding.¹⁵⁰

The approach is endorsed by the ICJ in the Anglo-Norwegian Fisheries Case which spoke of

the close dependence of the territorial sea upon the land domain. It is the land which confers upon the coastal state a right to waters off its coasts ... Another fundamental consideration ... is the more or less close relationship existing between certain sea areas¹⁵¹ and the land formations which divide or surround them.

It is equally true that a state's continental shelf is an extension of its land territory into and under the sea.

The PCIJ in the Eastern Greenland Case adopted, in principle, a very similar approach to both the acquisition and maintenance of sovereignty. From the judgment, it would seem that the demands that can be made in accordance with the principle of effectiveness concerning the exercise of

150. At his report to the League Committee of Experts, LN Doc. C.44, M.21, 1926, v, p.6.

151. ICJ Reports, 1951, p.133. In the North Sea Continental Shelf Cases, Waldock remarks: 'just as a certain right with respect to internal waters, with respect to the territorial sea and with respect to the contiguous zone, appertain ipso jure to a coastal state simply in virtue of its coast, so also do exclusive rights with respect to the continental shelf'. ICJ Pleadings, North Sea Continental Shelf, Vol. II, p.92.

'sovereignty' are very small, particularly in sparsely populated areas and in areas with no fixed settlements. Though Denmark had actually never exercised authority on the eastern coast of Greenland, the Court still recognised that in the course of time and because various Danish acts and other legislation had assumed validity for the whole Greenland area, Denmark had exercised sufficient authority over the non-colonised part to create a valid title of 'sovereignty'. The Court declared in terms reminiscent of those of Huber:

a claim to sovereignty based not upon some particular set or title such as a treaty of cession but merely upon continued display of authority, involves two elements each of which must be shown to exist; the intention and will to act as sovereign, and some actual exercise or display of such authority.¹⁵²

The Court referred to the fact that legislation is one of the most obvious forms of the exercise of sovereign power.¹⁵³ This is a further example of how the terminology of 'sovereignty' may obscure clearer understanding. To legislate for a certain territory is merely a vain pretension when there are no authorities to enforce the laws of the state

152. PCIJ Ser. A/B, No. 53, pp. 45-46 [italics added].

153. In the Minquiers and Ecrehos Case, the Court took the same view and attached particular importance to legislation as a display of state sovereignty; 'This legislative Act [a British Treasury Warrant of 1875] was a clear manifestation of British sovereignty over the Ecrehos at a time when a dispute as to such sovereignty had not yet arisen', ICJ Reports, 1953, p.66.

asserting the claim, unless of course, the area in question is remote and uninhabited, where, as in the case in question, little is needed. In the view of the Court in this case, the purported occupation by Norway of portions of Greenland was null in the sense of non-existent, because the land was already subject to Danish sovereignty and consequently an essential ingredient of the acquisition of title by occupation - i.e., that the territory should be res nullius¹⁵⁴ - was missing. But in his dissenting opinion, Judge Anzilotti expressed the view that the area in dispute was indeed res nullius and the occupation, though it fulfilled all the requirements for title by occupation, was ineffective because of a previous undertaking given to Denmark, which made it wrong vis-a-vis Denmark.¹⁵⁵ Yet, in practice, the Court stood the requirements of sovereignty on their head.

In the Island of Palmas and Clipperton Island¹⁵⁶ Arbitrations, it had at least been possible, in the face of two claimants to sovereignty, for the arbitrators to

154. The first rule of the acquisition of title by occupation is the requirements that territory must be terra nullius; and territory is in such case acquired simultaneously with possession. Quod anim nullius est, id ratione naturali occupanti conceditur. Dig. L. XLI. Tit. I, para. 3.

155. PCIJ Series A/B, No. 53, p.76, at pp. 84-86; see R.Y. Jennings, 'Nullity and Effectiveness in International Law', in Cambridge Essays in International Law (London: Stevens & Sons, 1965), p.67.

156. II RIAA, p.1107.

declare that one party had 'displayed state activities' and the other had not. In the case of Eastern Greenland there was, at the critical date to which the Court was asked to direct its attention, only one claimant to sovereignty over the island. The Court was unwilling to declare that Greenland had at any time constituted territorium nullius. Consequently, while paradoxically emphasising the need for a display of state authority, it was forced to lay still greater stress on the fact that:

Another circumstance which must be taken into account by any tribunal which has to adjudicate upon a claim to sovereignty over a particular territory, is the extent to which the sovereignty is also claimed by some other Power ...

It is impossible to read the records of the decisions in cases as to territorial sovereignty without observing that in many cases the tribunal has been satisfied with very little in the way of actual exercise of sovereign rights, provided that the other state could not make out a superior claim. This is particularly so in the class of claims to sovereignty over areas¹⁵⁷ in thinly populated or unsettled countries.

The reason for this is that various judicial decisions on sovereignty over territory - the Clipperton Island and the Island of Palmas Arbitrations - are concerned with very small and insignificant areas compared with that of Greenland. In the Clipperton Island Arbitration, where the island was

157. PCIJ Series A/B, No. 53, p.46. Judge Huber held in the Island of Palmas Arbitration that 'a jus in re once lawfully acquired shall prevail over de facto possession however well established', II RIAA, p.840.

uninhabited, physical and continuing occupation was not required as a condition of possession. It should also be noted that the Court's view that 'the intention and will to act as sovereign' which it found that Denmark continued to possess in Eastern Greenland in spite of a complete failure to 'display ... such authority' for five centuries, was sufficient to maintain that sovereignty, in being at least, when there was no competing activity on the part of any other state. However, there was substantial dissent within the Court. Moreover, it is important to distinguish acts creative of title, as in the Clipperton Island Arbitration, and acts which are merely evidence of a title, as in the Beagle Channel Arbitration. In the latter case, title to the Picton, Nueva and Lennox islands derived from the 1881 boundary treaty between Chile and Argentina. Evidence of Chilean acts of jurisdiction and Argentinian failure to protest was regarded as evidence confirming the Court's view that the treaty allocated these islands to Chile.¹⁵⁸

The next major dictum in support of Huber's theory of sovereignty is the well-known statement in the judgement of the ICJ in the Minquiers and Ecrehos Case, dismissing the

158. Award of Her Britannic Majesty's Government pursuant to the Agreement for Arbitration (Compromiso) of a Controversy between the Argentine Republic and the Republic of Chile concerning the region of the Beagle Channel (London: HMSO, 1977), pp. 105-6, para. 172. For discussion, see Malcolm Shaw, "The Beagle Channel Arbitration Award", VI International Relations (1978), p.415. See above, 2.6.3.

relevance of the elaborate historical arguments of the parties, which went back to the Norman Conquest of England in 1066 and the dismemberment of the Duchy of Normandy in 1204, with the words:

What is of decisive importance, in the opinion of the Court, is not indirect presumptions deduced from events in the Middle Ages, but the evidence which relates directly to the possession of the Eccehos and Minquiers groups.¹⁵⁹

The term 'possession' must be read as meaning 'possession in sovereignty' rather than, necessarily, 'physical occupation'. In this aspect, the Court found sovereignty lay with the United Kingdom on the basis of facts presented by the Jersey authorities involving the exercise of criminal jurisdiction, the conduct of inquests on corpses washed ashore, the imposition of taxes on huts, the maintenance of a register of fishing boats, a register of sales of real property, the establishment of a customs house and the construction of a slipway and various mooring buoys and beacons.¹⁶⁰ Yet again, however, the contrast between the statement of principle and the actual evidence of possession is considerable.

A further statement of principle, to similar effect, but giving still greater emphasis to the relativity of the display of state functions, was made by Judge Lagergron,

159. ICJ Reports, 1953, p.57 [italics added]. This question must ultimately depend on the evidence which relates directly to the possession of these groups. Ibid., p.55.

160. Ibid., pp. 65-69.

the Chairman of the Arbitral Tribunal in the Rann of Kutch Arbitration. He observed:

Territorial sovereignty implies, as observed by Judge Huber in the Island of Palmas case, certain exclusive rights which have as their corollary certain duties. In adjudging conflicting claims by rival sovereigns to a territory, all available evidence relating to the exercise of such rights, and to the discharge of such duties, must be carefully evaluated with a view to establishing in whom the conglomerate of sovereign functions¹⁶¹ has been exclusively or predominantly vested.

The most interesting part of that statement is the reference to the question of 'in whom the conglomerate of sovereign functions has [been] exclusively or predominantly vested'. Where there are competing acts of sovereignty, 'effectiveness' in the abstract cannot be determined, but the 'comparative' or 'relative' effectiveness of each claimant can be assessed.

Much of the evidence in support of the vesting of 'sovereign functions' in Sind or Pakistan related to acts of individuals; it was therefore necessary, if this evidence was to be taken into account, to attribute it to the sovereign. To this end Judge Lagergren laid stress upon the social and economic organisation of the neighbouring states. Both Sind and Kutch were agricultural societies, and

The activities and functions of Government ... were ... limited mainly to the imposition of customs duties and taxes on land, livestock and agricultural produce in the fiscal sphere, and to the maintenance of peace and order by police and civil and criminal courts and other law enforcement agencies in the general public sphere.¹⁶²

161. 50 ILR (1976), p.500.

162. Ibid., p.501.

Moreover,

the borders between territories under different sovereignty still marked a strict division of economic rights as well as Government functions ... ownership by an Indian ruler of agricultural property could imply and carry with it such a measure of sovereignty over it as to include ¹⁶³taxing authority, and civil and criminal jurisdiction.

In consequence, state and private economic interests and activities were closely associated 'because of the close dependence of the taxation system on the land and the agriculture production'.¹⁶⁴ Thus, where the sovereign virtually owned the territory of the state, acts of his tenants might without difficulty be deemed creative of rights for the state. The line of reasoning is however, more appropriate to the 'property' than to the 'jurisdictional' concept of sovereignty.

Again, in the Western Sahara Case, the ICJ was asked 'what were the legal ties between Western Sahara and the Kingdom of Morocco and the Mauritanian entity?'.¹⁶⁵ Morocco's claim to legal ties was based on the public display of sovereignty, uninterrupted and uncontested, for centuries. In support of this claim, Morocco not only referred to a

163. Ibid.

164. Ibid. In the Frontier Land Case, the Netherlands relied on the fact that it had collected Netherlands land tax on the two disputed plots without any resistance or protest on the part of Belgium. ICJ Reports, 1959, p.229. See above, 2.6.3.

165. ICJ Reports, 1975, p.3.

series of historical material but also invoked, inter alia, the decision of the PCIJ in the Eastern Greenland Case.

Stressing that during a long period Morocco was the only independent state which existed in the north-west of Africa, it rested upon the geographical contiguity of Western Sahara to Morocco and the desert character of the region. In the light of these considerations, it maintained that the historical material sufficed to establish Morocco's claim to a title based 'upon continued display of authority', on the same principles as those applied by the PCIJ in upholding Denmark's claim to possession of the whole of Greenland. The method of formulating Morocco's claim encountered certain difficulties. As the Court stated in the Eastern Greenland Case, a claim to sovereignty based upon continued display of authority involves two elements each of which must be shown to exist: animus occupandi coupled with corpus occupandi.¹⁶⁶ Moreover, such activity must be continuous: by discontinuing it, the state will either have lost or the state will be deemed never to have acquired a title.¹⁶⁷ It is true that

166. PCIJ Series A/B, No. 53, pp. 45-46.

167. Judge Huber in the Island of Palmas Arbitration held that 'the growing insistence with which international law has demanded that ... occupation shall be effective, would be inconceivable if effectiveness were required only for the act of acquisition and not equally for the maintenance of the right'. See II RIAA p.839. Professor Waldock observes that 'an established title may be lost not only by voluntary abandonment but by mere inactivity, that is, by failure to display state activity with a continuity appropriate to the circumstances'. See C.H.M. Waldock, 'Disputed Sovereignty in the Falkland Islands Dependencies', 25 BYIL (1948), p.321.

the PCIJ in the Eastern Greenland Case recognised that in the case of claims to sovereignty over areas in thinly populated or unsettled countries 'very little in the way of actual exercise of sovereign rights'¹⁶⁸ might be sufficient in the absence of a competing claim. But in the present case, the Western Sahara, if somewhat sparsely populated, was a territory across which socially and politically organised tribes were in constant movement.¹⁶⁹ Likewise, it seems that the Court was much influenced by the judgment in the Minquiers and Ecrehos Case. It declared:

What must be of decisive importance in determining its answer ... is not indirect inferences drawn from events in past history but evidence directly relating to effective display of authority in Western Sahara at the time of its colonisation by Spain and in the period immediately preceding that time.¹⁷⁰

Consequently, the Court held that Morocco could not be considered to have exercised effectively internal sovereignty over Western Sahara.¹⁷¹

It is clear that there has been a certain change in legal thinking on the exercise of 'state functions'. The emphasis has shifted from the taking of physical possession of the land and the exclusion of others to the manifestation

168. PCIJ Series A/B, No. 53, p.46. This judgment is in complete harmony with the Clipperton Island Arbitration in holding that the requisites of effective occupation depend on the circumstances of the territory, and that settlement or local administration is not necessarily required in the case of uninhabited territory. II RIAA, p.1107.

169. ICJ Reports, 1975, pp. 42-43 paras. 90-92. Cf. the Barotseland Boundary Arbitration [1905] XI RIAA, p.59.

170. ICJ Reports, 1975, p.43, para. 93 [*italics added*].

171. Ibid., p.47, para. 103.

and exercise of the functions of government over the territory. This change is a natural consequence of the recognition that in modern international law occupation is the acquisition of sovereignty rather than of property. Occupation is not only the assumption of the exclusive right to display state activities in the territory. It is also the assumption of a duty to protect within the territory the rights of other states both in regard to their security and in regard to the treatment of their nationals in the territory.¹⁷² Thus, in the Award of the Grisbadarna Arbitration, among the reasons given for the allocation of the Grisbadarna bank to Sweden was that Sweden had performed various acts in the Grisbadarna region (for instance, the placing of the beacons, the measurement of the sea and the installation of a light-ship), acts which involved considerable expense. In doing so, Sweden was not only exercising its right but even more was performing its duty; whereas Norway showed much less solicitude in this region in these various regards.¹⁷³

172. See Waldock, op. cit., 25 BYIL (1948), p.317. Cf. Sir Gerlad Fitzmaurice 'The Law and Procedure of the International Court of Justice, 1951-54: Points of Substantive Law, Part II', 32 ibid (1955-56), pp. 49-52.

173. [1909] XI RIAA, p.147. English trans. in 4 AJIL (1910), p.233.

3.4.2 Sea Areas

The delimitation of sea boundaries reflects a continuum of experience gained from state practice relating to land boundaries, thence to nearshore limits, and finally to those further offshore. As a result, the concepts of boundary delimitation have undergone gradual evolutions as new environments were divided. Relevant experiences gained on land were often utilised for territorial sea boundaries.¹⁷⁴ However, there has always been considerable doubt concerning the application of the principle of effectiveness to the sea areas in which state authority cannot actually be displayed. The important considerations are not dissimilar for sea areas to those applied in terra nullius or uninhabited land territory; the major distinction is that, because the outward boundaries of maritime claims are a res communis, the interests of the general international community must be taken account of, and a concept of 'reasonableness' has been applied. Actual administration of land territory is a paramount factor, but actual administration of sea areas is, ipso facto, somewhat fictional. Judge Reed in the Anglo-Norwegian Fisheries Case recognised that:

174. For details, see Robert D. Hodgson and Robert W. Smith, 'Boundaries of the Economic Zone', Miles and Gamble (ed) Law of the Sea: Conference Outcomes and Problems of Implementation, Proceedings of the Law of the Sea Institute, Tenth Annual Conference, June 22-25, 1976 (Massachusetts: Ballinger, 1977), p.183.

The only convincing evidence of state practice is to be found in seizures where the coastal state asserts its sovereignty over the waters in question by arresting a foreign ship and by maintaining its position in the course of diplomatic negotiation and international arbitration.¹⁷⁵

Apart from the fictitious nature of actual administration of maritime areas, it is doubtful whether submarine areas can actually display state authority. Although it has been suggested that submarine areas were either res communis, which might be acquired by prescription, or res nullius which any state might occupy and exploit in conformity with the rules on the right of occupation,¹⁷⁶ it is now manifest that the principle of effectiveness is inapplicable to the bed and subsoil of the marginal sea, not only because submarine areas differ by nature from the land territory, but also because 'the submarine areas concerned may be deemed to be actually part of the territory over which the coastal state already has dominion' - in the sense that, although covered with water, they are a 'prolongation', 'continuation' or 'extension' of the state's land territory.¹⁷⁷ This emerges

175. ICJ Reports, 1951, p.191.

176. H. Lauterpacht's remarks, I YBILC (1953), p.74, paras. 4-8; idem, 'Sovereignty Over Submarine Areas', 27 BYIL (1950), p.376; D.H.N. Johnson, 'Acquisitive Prescription in International Law', ibid., p.332; M. Roger Pinto, 'La Prescription en Droit International', 87 Recueil des Cours (1955-I), p.391.

177. ICJ Reports, 1969, p.31, para. 43. Cf. Art. 2(3) of the 1958 Geneva Convention on the Continental Shelf.

clearly from the emphasis placed by the ICJ in the North Sea Continental Shelf Cases on 'natural prolongation' of the land as a criterion for determining the extent of a coastal state's entitlement to continental shelf as against other states abutting on the same continental shelf. The criterion of natural prolongation has been invoked by both Greece and Turkey in the Aegean Sea Continental Shelf Case.¹⁷⁸ Also, this criterion was re-affirmed by the Court of Arbitration in the Anglo-French Continental Shelf Arbitration.¹⁷⁹ Moreover, actual administration of submarine areas, as has been shown, is indeed fictional. Actual exploitation of the resources of the sea area is probably the most decisive consideration.¹⁸⁰

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178. ICJ Reports, 1978, p.36, para. 86. See below, Ch. 7.
179. Miscellaneous No. 15 (1978), Cmd. 7438, pp. 82-83, para. 165; 86-87, para. 174; 91, para. 191; 93, para. 194. Professor Brown views that natural prolongation is not a good criterion for delimitation of boundaries of adjacent states though alright for opposite states, see E.D. Brown, 'The Anglo-French Continental Shelf Case', 16 San Diego LR (1979), p.461, at pp. 479-82. See also idem, 'The Anglo-French Continental Shelf Case', YBWA (1979), p.304. Cf. D.W. Bowett, 'The Arbitration between the United Kingdom and France concerning the Continental Shelf Boundary in the English Channel and South-Western Approaches', 49 BYIL (1978), p.1; D.M. McRae, 'Delimitation of the Continental Shelf between the United Kingdom and France: The Channel Arbitration', 15 Canadian YIL (1977), p.187. See below, Ch. 7.
180. See e.g., the Grisbadarna Arbitration, Scott, The Hague Court Reports, 1916, p.121; North Atlantic Coastal Fisheries Arbitration, XI RIAA, p.173; Gulf of Fonseca Arbitration, 11 AJIL (1917), p.674; Anglo-Norwegian Fisheries Case, ICJ Reports, 1951, p.116; and Anglo-Icelandic Fisheries Jurisdiction Case, ICJ Reports, 1974, p.3. See below, Ch. 5.

4. Conclusion

It is important to remember, in the first place, that the primary object of a boundary is to maintain territorial 'stability' and 'effectiveness'. Secondly, the principal function of the international boundary is to preserve the territorial status quo, i.e. stability. Thirdly, the principle of stability appears in various different forms. In boundary treaties, it corresponds to the maxim pacta sunt servanda; in principle, the clausula rebus sic stantibus is not applicable to boundary treaties. In the delimitation of the continental shelf boundaries, this principle is not only related to an equitable division of all aspects of the continental shelf among the states concerned: stress is often laid on the need for acceptable, agreed delimitation based on equitable principles, and on the notion of a concession. Unless and until the acquired concession rights are guaranteed as being stable, foreign companies would be reluctant to engage in offshore explorations and exploitations. In boundary disputes, international judicial and arbitral tribunals have consistently observed and often given priority to the need for stability. However, indiscriminate application of the principle of stability is liable to result in injustice.

Fourthly, with regard to territorial acquisition, the continuous and peaceful display of territorial sovereignty is as good as a title. Essential constituents of the principle of effectiveness are: State activity à titre du souverain, continuity of activity over some undefined period of

time, and, to the extent appropriate to the territory, over the disputed area; and some element of acquiescence by other states. The principle of effectiveness might serve as an adequate justification for undisputed territorial sovereignty, and might suffice to determine disputes such as those of the Island of Palmas, Clipperton Island and Eastern Greenland, but it could not serve to determine disputes in which no sovereignty or conflicting acts of sovereignty were asserted, or the elements of a passage of time, or of acquiescence, were not fulfilled.

Fifthly, it may be suggested that these obiter dicta are more interesting and valuable as statements of judicial method than as statements of the basis of territorial sovereignty. An international tribunal would be manifestly failing in its duty if it did not examine the evidence adduced by the parties. But if the requirement of some exercise of sovereign functions is to be regarded as a test of title to territory, rather than a mere description of the type of evidence offered by the parties to a territorial dispute, we must consider whether international tribunals have established any standard regarding the type or weight of evidence required. If this were so, then one might expect an international tribunal to have been prepared on occasion, to declare that neither party to a territorial dispute had established a claim in law. However, consideration of the facts and reasoning of the cases in which those statements of principle have appeared to suggest the contrary.

Sixthly, international tribunals have not awarded disputed territory to this or that state on the ground that the state itself had made its sovereignty 'effective', but rather awards of territory were made on the basis of an assessment of 'connecting factors', 'equity' and 'reasonableness'. For, as with territorial disputes, it is commonly the 'ineffectiveness' of administration by claimants which is at the root of the dispute. This is particularly true in relatively isolated and unpopulated areas.

Seventhly, the principle of effectiveness may be modified and made more elastic or more stringent as international conditions require. This is merely a manifestation of the necessity of adapting the general principles of law to the requirements of international order and stability. Such modifications do not, in principle, affect the fundamental analogy in the processes of acquisition of territorial title and of private proprietary rights.

Finally, the principle of effectiveness is inappropriate in decisions concerning claims to submarine and sea areas. The important considerations for sea areas are not dissimilar to those applied to terra nullius or uninhabited land territory.¹⁸¹ Actual administration of sea areas is somewhat fictional. Actual exploitation of natural resources is probably the most decisive consideration.

181. Cf. the Principle of Natural Prolongation. See below, Ch. 7.

CHAPTER 3TRANSFERS OF TITLE TO TERRITORY, THE LEGAL STATUS
OF WHICH IS IN DOUBT1. Introduction

International judicial and arbitral tribunals have approached issues involving sovereignty over territory in a manner generally pragmatic and unconcerned with the theoretical issues treated by writers. Discussions of issues of principle are rare in arbitral awards and decisions of courts; in particular, the attribution of sovereignty over territory has rarely been put in terms of the modes of acquiring property which writers on the international law of territory have borrowed from municipal law. Generally, such modes as 'occupation' and 'prescription' have been rejected as inapplicable to the facts, of doubtful application in international law, or simply ignored in favour of other considerations. In this chapter the considerations which have motivated awards regarding territorial sovereignty will be considered seriatim. First, the views expressed by tribunals on the orthodox modes of acquiring territory which have arisen before them will be considered: primarily, discovery, settlement, use, occupation, prescription and abandonment. It is manifestly true that contemporary international law rejects any title based on 'mere discovery' or on an 'act of a purely symbolic nature', such as hoisting a

flag, or even on a formal proclamation of annexation without further effective occupation. As a consequence, title based on effective occupation is still considered valid.

Then, the criteria which have more frequently motivated decisions will be examined: the exercise of state functions, acquiescence, estoppel and recognition. Before we proceed to discuss these fundamental rules of acquisition and loss of territory, it should be emphasised that all these modes are closely involved in the controversy concerning claims to the Tiao Yu Tai and Nansha Islands and their adjacent submarine areas and are of particular relevance to the dispute concerning claims to sovereignty over the Falkland Islands and their adjacent submarine areas which has resurged during the writing of this work. It is considered that such disputes justify a detailed re-examination of the fundamental principles concerning modes of acquiring title to territory and their effect on rights over contiguous submarine areas.

2. Discovery, Settlement or Use

2.1 Discovery

The term 'acquisition by discovery' has from earliest times had an inherent ambiguity. Questions were asked concerning whether 'discovery' required 'visual apprehension' alone, or whether it required some additional act of physical taking of possession or occupation. Gaius, for example, declared that a hunter acquired nothing by seeing an animal,

or even by so wounding it as to make its capture possible. It becomes his only on actual capture.¹ In actual practice, the principal states engaged in explorations in the age of discoveries founded their claims upon more than a mere 'visual apprehension'. Grotius for instance wrote as follows:

For discovery consists, not in perceiving a thing with the eye, but in actual seizure ... Thus the philologists treat the expressions 'to discover' (invenire) and 'to take possession of' (occupare) as synonymous terms; and, according to all Latin usage, we have 'discovered' only that which we have acquired (adepti), the opposite process being that of 'loss' (perdere), ... discovery suffices to create a title to ownership only when possession is an accompanying factor; that is to say, only in cases where ... immovable property is marked off by boundaries and placed under guard.²

In contemporary international law, discovery of territory does not confer a valid title unless followed by occupation. In earlier times, however, mere discovery was sufficient to create a good and complete title. Thus Spain claimed the whole coast of America northward from the Gulf of Mexico on the grounds of a possible discovery of Florida in 1498 by Amerigo Vespucci and a certain landing on its shores by Ponce de Leon in 1513. But the English claimed

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1. Francis de Zulueta, The Institutes of Gaius, Pt. 1 (Oxford: Clarendon Press, 1951), p.83, para. 67.
 2. Hugo Grotius, De Iure Praedae Commentarius, Vol. 1 English trans. by G.L. Williams and W.H. Zeydel (Oxford: Clarendon Press, 1950), Ch. XII, pp. 220-21.

the greater part of the same coast on account of the discovery of Cape Breton or Newfoundland by John Cabot in 1497, and the exploration of the shore from Nova Scotia to Cape Hatteras, by his son Sebastian in 1498, while a few years afterwards France put in a similar claim based on the discovery of what is now North Carolina in 1524 by Verrazzano, a Florentine in the service of the French king.³

In 1506 Pope Julius II confirmed the Treaty of Tordesillas of 1494 by which Spain and Portugal modified their boundary extending the right of Portugal to a line drawn 370 leagues west of the Cape Verda Islands.⁴ In 1562 however, Queen Elizabeth I repudiated Portugal's claim to sovereignty over lands which Portugal claimed merely on the basis of discovery:

As she did not acknowledge the Spaniards to have any title by donation of the Bishop of Rome, so she knew no right they had to any places other than those they were in actual possession of; for that their having touched only here and there upon a coast, and given names to a few rivers or capes, were such insignificant things as could in no way entitle them to a propriety further than in the parts⁵ where they actually settled and continued to inhabit.

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3. Thomas Joseph Lawrence, A Handbook of Public International Law, 10th ed., Rev. by P.H. Winfield (London, 1925), p.149.
 4. The Treaty was ratified by Ferdinand and Isabella at Arevalo on 2 July 1494, and by John II at Setubal on 5 September of the same year. Peter Fischer (ed), A Collection of International Concessions and Related Instruments, Vol. 5 (Dobbs Ferry, New York: Oceana Publ., 1977), pp. 23 et seq.
 5. Camden's Annals (1580). Translated as in Travers Twiss, The Oregon Question Examined in Respect to Facts and the Law of Nations (Longman, Brown, Green and Longmans, 1846), p.151. See also L. Oppenheim (ed), The Collected Papers of John Westlake on Public International Law (Cambridge U.P., 1914), p.160.

Evidently a controversy of this kind could not be long maintained on the grounds of abstract and contradictory principles, neither of which could be entirely ignored by those who invoked the other.

Up to the sixteenth century, title by discovery - in the sense of symbolic taking of possession rather than merely sighting - was generally recognised. It should be emphasised that, under the doctrine of inter-temporal law,⁶ the right of states to land territories discovered in the sixteenth century is determined not by the contemporary international law but by the traditional international law as understood at the time of the initial claim.

In the declaration of 4 June 1790, signed by the Conde de Florida Blanca and sent to all the courts of Europe during the Nootka Sound controversy, the King of Spain limited his claim in the Pacific to 'the continent, islands and seas which belong to His Majesty, so far as discoveries have been made and secured to him by treaties and immemorial possession

6. In the Case Concerning Certain German Interests in Polish Upper Silesia (Merits), the Court stated that Article 256 of the Treaty of Versailles must be construed 'in the light of the law in force at the time transfer of sovereignty took place'. PCIJ Ser. A, No. 7, p.41. Cf. Island of Palmas Arbitration, II RIAA p.839; Eastern Greenland Case, PCIJ Ser. A/B, No. 53; Minquiers and Ecrehos Case, ICJ Reports, 1953, p.56. For a full statement of the doctrine, see Oral Argument of Sir Lionel Heald (U.K.), ICJ Pleadings, The Minquiers and Ecrehos Case, Vol. II, pp. 50 et seq. See also T.O. Elias, 'The Doctrine of Intertemporal Law', 74 AJIL (1980), p.285, esp. at pp. 305-7.

and uniformly acquiesced in, notwithstanding some infringements by individuals who have been punished upon knowledge of their offences'.⁷

A formal ceremony of taking of possession used to be deemed sufficient to establish immediately a right of sovereignty over, or a valid title to, areas so claimed and did not require to be supplemented by the performance of other acts, such as, for example, 'effective occupation'. A right or title so acquired and established was deemed to be sufficient against all subsequent claims set up in opposition thereto unless, perhaps, transferred by conquest or treaty, relinquished, abandoned, or successfully opposed by continued occupation on the part of some other state.⁸

During the nineteenth century it became clearly established that neither mere sighting of new lands nor symbolic takings of possession would suffice, unless accompanied by some degree of actual occupation, if habitable. The principle, repeatedly affirmed and applied by international arbitral tribunals, was sought from Sir William Scott who in The Fama declared:

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7. Twiss, op. cit., pp. 109, 163; The Collected Papers of John Westlake on Public International Law, pp. 160-61.
 8. A.S. Keller, O.J. Lissitzyn et al, Creation of Rights of Sovereignty Through Symbolic Acts, 1400-1800 (New York: Columbia U.P., 1938), pp. 148-49. See also F.A.F. von der Heydte, 'Discovery, Symbolic Annexation and Virtual Effectiveness in International Law', 29 AJIL (1935), pp. 448-71.

Even in newly-discovered countries, where a title is meant to be established, for the first time, some act of possession is usually done and proclaimed as a notification of the fact.

In the Island of Palmas Arbitration,¹⁰ the USA based its claim to the island, inter alia, on the acquisition, through discovery, by Spain of a title to sovereignty over the island. The Netherlands argued that the fact of discovery by Spain was not proven, nor yet any other form of acquisition, and even if Spain had at any moment had a title, such title had been lost.¹¹ Moreover, the Netherlands, through the Netherlands East India Company, had possessed and exercised rights of sovereignty from 1677 onwards, arising from conventions with the native princes of Sangi, which established the suzerainty of the Netherlands over those princes' territories including Palmas. Judge Huber held that the records of the discovery of the Island of Palmas stated only that an island was "seen", which apparently was the island in dispute. No mention was made of any landing, and no signs of taking of possession by Spain, or of administration, had been shown until a very recent date. Even if the effect of discovery by Spain was to be determined by the rules of international law which were in force in the first quarter of the sixteenth century, it was by no means certain that even at

9. 5 C. Rob. 115 [italics supplied].

10. II RIAA, p.829.

11. Ibid., p.837.

that date mere discovery conferred territorial sovereignty, as opposed to an inchoate title which would be completed eventually by taking possession within a reasonable time. The Netherlands title based on continuous and peaceful display of state authority - an inchoate title for completing the conditions of sovereignty - would prevail over an inchoate title derived from discovery.

The actual decision on the facts of this case, as we shall see in the next section, is of slight authority as an application of the principle of effectiveness, still less of prescription. It is authority in favour of the proposition that a weak and doubtful 'inchoate title' may become obsolete by reason of its 'ineffectiveness'; and for the establishment of a 'hierarchy' of inchoate titles to guide decision on the relative equities of the parties.

In the Clipperton Island Arbitration,¹² the dispute between Mexico and France related to a small guano island in the Pacific Ocean. It had been annexed to France by a proclamation of 1858. No further act of sovereignty was shown by France or any other power until 1897. The island was uninhabited; a guano concession had been granted in 1858, but was not exploited. A protest was made by France to the United States when it was found in November 1897 that three American citizens were gathering guano on the island and had raised the American flag; the United States disowned any

12. 26 AJIL (1932), p.390.

claim to the island, and denied having granted any concession. In the same year a Mexican detachment of officers and marines landed on the island, raised the Mexican flag, and left two days later. France claimed the island on the basis of its annexation proclamation; Mexico based its claim by succession to a precedent Spanish sovereignty, founded on discovery. The question of the ownership of Clipperton Island was referred by France and Mexico to the arbitration of the King of Italy. The award rejected the Mexican claim as successor to Spain; discovery and occupation of the island took priority because the prior Spanish discovery was not proved, and furthermore there was no proof of any effective occupation by Mexico itself before 1858. Even if Spain had discovered the island,

it would be necessary for Mexico to prove that Spain not only had the right to incorporate the island in her possessions, but also had effectively exercised the right. That has not been demonstrated at all. Mexico's claim based on an historic right is not supported by any¹³ manifestation of her sovereignty over the island.

It is a settled law that in modern practice, no state seems to have claimed that mere discovery, unaccompanied by some act to show that possession was taken of the land, was sufficient to found a title. Discovery per se is not a root of title but merely creates a right that gives to the state in whose service it was made an inchoate title, which acts

13. 26 AJIL (1932), p.390.

as a temporary bar to occupation by another state for such a period as is reasonably sufficient to allow for effective occupation of the discovered territory. Discovery must be followed by an act of possession, also by acts amounting to a notification of the claims to other states. A concealed discovery will not prevent others. In other words, discovery should be accompanied or followed up by a claim or assertion of sovereignty on the basis of the discovery, either by the discoverer himself, if empowered or commissioned to do so, or by his government, either separately or by way of ratification of the discoverer's act.

2.2 Settlement or Use

Two problems, however, are raised by the possible acquisition of uninhabited territory by an existing state: first, what is the geographical extent of the right of appropriation - is it, in particular, dependent on and limited to the area which is in fact settled? Secondly, are sparsely inhabited areas to be assimilated to uninhabited areas for the purpose of appropriation?

For Vattel, the answer to the first question was that the acquisition of both ownership and sovereignty was conditional on either 'settlement'¹⁴ or 'use'. He states:

14. Settlement, accordingly, in a country or in the case of a Nation corresponds to the continuing detention of a thing in the case of an individual, and the Natural Right of a Nation founded on Settlement corresponds to the Natural Right of an individual founded on Possession. Travers Twiss, The Law of Nations Considered as Independent Political Communities, On the Right and Duties of Nations in Time of Peace (Oxford U.P. MDCCCLXI), p.161, para. 109; Title by settlement is in itself an imperfect/

[I]t is questioned whether a Nation can thus appropriate, by the mere act of taking possession, lands which it does not really occupy, and which are more extensive than it can inhabit or cultivate. It is not difficult to decide that such a claim would be absolutely contrary to the natural law, and would conflict with the designs of nature, which destines the earth for the needs of all mankind, and only confers upon individual Nations the right to appropriate territory so far as they can make use of it, and not merely to hold it against others who may wish to profit by it. Hence the Law of Nations will only recognise the ownership and sovereignty of a Nation over unoccupied lands when the Nation is in actual occupation of them, when it forms a settlement upon them, or makes some actual use of them. In fact, when explorers have discovered uninhabited lands through which the explorers of other Nations had passed, leaving some sign of their having taken possession, they have no more troubled themselves over such empty forms than over the regulations of Popes, who divided a large part of the world between the crowns and Castile and Portugal.¹⁵

imperfect title, and its validity will be conditional upon the territory being vacant at the time of the settlement, either as never having been occupied, or as having been abandoned by the previous occupant. For further discussion, see idem, The Oregon Question Examined in Respect to Facts and the Law of Nations Ch. IX, p.168. It is noteworthy that the presumption of law will always be in favour of a title by settlement rather than by discovery. Cf. Justin. Institut. Lib. IV. Tit. 15, para. 4. Lawson, op. cit., Ch. XII, p.127; Cheshire's Modern Law of Real Property, 11th ed., Edited by E.H. Burn (London: Butterworths, 1972), pp. 70 et seq; Cf. Eastern Greenland Case, PCIJ Ser. A/B. No. 53.

15. E. de Vattel, Le Droit des Gens, English trans. by C.G. Fenwick (Washington: Carnegie Institute, 1916), Bk. I, Ch. XVIII, p.85, para. 208 [italics added]. Cf. Bk. II, Ch. VIII, pp. 138-39, para. 83. Christian Wolff, Jus Gentium Methodo Scientifica Pertractatum (1764; rpt. Oxford: Clarendon Press, 1934), Cap. III, para. 291. For Papal Grants, see A Collection of International Concessions and Related Instruments, Vol. 5, p.23. See above, 2.1.

Further, Vattel envisaged two primary means of acquiring territory: the acquisition of dominium and imperium over unoccupied territory by settlement; and the establishment of a state by the inhabitants of a territory. The first means finds its justification in the dictum that:

All men have an equal right to things which have not yet come into the possession of anyone, and these things belong to the person who first takes possession.¹⁶

It seems necessary to point out that the first rule of the acquisition of title¹⁷ by occupation is the requirement that territory must be terra nullius;¹⁸ and territory is in such cases acquired simultaneously with possession.

Quod enim nullius est, id ratione naturali occupandi conceditur.¹⁹

16. Le Droit des Gens, op. cit., Bk. I, Ch. XVIII, p.84, para. 207. 'When a Nation takes possession of a country which belongs to no one, it is considered as acquiring sovereignty over it as well as ownership'. see ibid., para. 205. The acquisition of sovereignty, therefore, attends as a necessary consequence upon the establishment of a nation in a country. Cf. ibid., Bk. I, Ch. XX, p.97, para. 250.
17. Title is a shorthand term used to denote the fact which, if proved, will enable a plaintiff to recover possession or a defendant to retain possession of a thing.
18. It may be in this condition either because no one has ever appropriated it or because, though once appropriated, it has subsequently been abandoned. In the Western Sahara (Advisory Opinion) Case, the Court said that the expression terra nullius was a legal term of art employed in connection with 'occupation' as one of the accepted legal methods of acquiring sovereignty over territory. ICJ Reports, 1975, pp. 38-39, para. 79.
19. That which is no-one's is granted to the occupant by natural right. See Dig. L. XLI. Tit. I, para. 3; Just. Inst. Lib. II, Tit. I, para. 12. Sir William Scott held in The Fama (1804) 5 C Robinson 114 that 'all corporeal property depends very much upon occupancy. With respect to the origin of property, this is the sole foundation, Quod nullius est ratione naturali occupandi id conceditur'.

The question of whether a territory is terra nullius arises as a practical issue when a state proclaims its sovereignty over it by an act of occupation. If such an act is challenged by another state, the validity or invalidity of the occupation is determined by the character of the territory in question as terra nullius. This expression describes a territory over which no state exercises its sovereignty and is regarded as open to acquisition by any state. For example, in the Eastern Greenland Case,²⁰ the PCIJ rejected the Norwegian contention that Eastern Greenland was terra nullius; on the strength of this finding it decided that the declaration of occupation promulgated by the Norwegian Government, and any steps taken in this respect, were 'accordingly unlawful and invalid'.

Secondly, it must be remembered that title by discovery is only an inchoate title which is neither recognised by Roman law²¹ nor has a place in the systems of Grotius or Vattel. Title by discovery is different from title by settlement. A title by a later settlement may be set up against a title by an earlier settlement, even where this has been formed by the first occupant, if the earlier settlement can be shown to have been abandoned.²² However, there can be no second discovery of a country, because a title by second discovery cannot be

20. PCIJ Ser. A/B, No. 53, p.75. See below, 3.3.3.

21. Justinian's Institutes, Lib. II, Tit. I.

22. For this notion see below, Ch. 4.

set up against a title by first discovery.²³ Thirdly, 'title by settlement' is distinct from 'title by discovery' and 'title by occupation'. In this connection, no second discovery and occupancy can take place, whereas a series of settlements may have been made successively and each of them in its turn abandoned, and the last settlements may, under certain circumstances, constitute an exclusive title. Fourthly, if discovery were followed by 'use' or 'settlement', it would clearly constitute a perfect title; but a title by 'use' or 'settlement' when not combined with a title by discovery is in itself imperfect.²⁴

Uninhabited and uncultivated areas within the territory of a state were, nevertheless, regarded by states in general as included within its 'ownership' and 'sovereignty':

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23. 'A second-comer', Vattel writes, 'who has an equal right, may not exercise it to the impairment of mine [the first-comer], and in stopping me by his arrival he would be claiming a greater right than mine [the first-comer] and violating the law of equality'. Le Droit des Gens op. cit., Bk. I, Ch. XX, p.97, para. 250. Wolff also explains this reason very clearly. Christian Wolff, Institutes du Droit de la Nature et des Gens (Leide, Chez Elie Luzac, MDCCLXXII), p.82, para. CCIII: Twiss, The Oregon Question Examined, Ch. VIII, p.156; idem, The Law of Nations, p.161, para. 110.
24. See, e.g. Clipperton Island Arbitration, II RIAA, p.1105; Eastern Greenland Case, PCIJ Series A/B, No. 53. Although these cases do not expressly indicate that discovery must necessarily be followed by effective occupation to render a claim to title valid, there can be no doubt that occupation is as clear evidence of ownership as can be manifested. Cf. Island of Palmas Arbitration, II RIAA, p.830. See generally, J.B. Moore, A Digest of International Law, Vol. I (Washington: Govt. Printing Office, 1906), p.258; Westlake, op. cit., Part I, pp. 96-98, 101-5; The Collected Papers of John Westlake on Public International Law, pp. 158-66; W.E. Hall, A Treatise on International Law, 8th ed. edited by A. Higgins (Oxford: Clarendon Press, 1924), pp. 126-27.

Whatever is included in its territory belongs to a Nation, and no one else may dispose of such property unless the Nation has transferred its rights; if it has left certain districts wild and untitled, they may not be taken possession of at will without its permission. Although it may not be making actual use of them, these districts belong to it, and it has an interest in keeping them for future use; also it need render account to no one of the manner in which it employs its property. Nevertheless ... no Nation may lawfully appropriate an extent of territory entirely disproportionate to its needs, and thus restrict the opportunity²⁵ of settlement and sustenance for other Nations.

In dealing with the problem of partially inhabited areas, Vattel took the view that at least such areas as were needed, inhabited and cultivated - or were appropriate to satisfy a potential need - might properly be appropriated by other nations.²⁶ Conquest consists in the appropriation of the property, and in the acquisition of territory. Vattel indeed distinguished the conquest of the civilized as from the cultivated areas of the New World:

While the conquest of the civilized Empires of Peru and Mexico was a notorious usurpation, the establishment of various colonies upon the continent of North America might, if done within just limits, have been entirely lawful. The peoples of those vast tracts of land²⁷ rather roamed over them than inhabited them.

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25. Le Droit des Gens, op. cit., Bk. II, Ch. VIII, p.140, para. 86.
 26. Ibid., Bk. I, Ch. XVIII, p.85, para. 209. Cf. Art. 35 of the General Act of the Conference of Berlin of 1885 recognised 'the obligation to insure the establishment of authority in the regions occupied by [the signatory States] on the coasts of the African Continent sufficient to protect existing rights, and, as the case may be, freedom of trade and of transit under the conditions agreed upon'. Africa No. 3 (1886) C. 4739.
 27. Le Droit des Gens, op. cit., Bk. I, Ch. VII, pp. 37-38, para. 81.

Now it is manifest that Grotius and Vattel deal in the passages quoted with a number of different situations, justifications for attributing certain areas to the dominium or imperium (or both), or - in the terminology adopted by later writers - 'modes of acquiring territory', which cannot all be brought under the rubric of the mode of acquiring territory described as 'occupation'. The extent of the area 'occupied' in law is determined by actual 'settlement' or 'use'. But to this are normally to be added in the case of a state, further areas, the bounds of which are determined by criteria of geographical unity, security, potential value and the extent of the effective control - imperium or soverainete or empire of the state. It is therefore an error - which is commonly committed by most writers on territory - to suppose that the classical writers on international law slavishly adopted in discussing the acquisition of state territory the analogies of Roman private law. And it would clearly be a mistake to subsume, as later writers have been want to do, those latter criteria (other than settlement and use) into a category of 'constructive' occupation or possession. In consequence, Vattel considered that:

When ... a Nation finds a country uninhabited and without an owner, it may lawfully take possession of it, and after it has given sufficient signs of its intention in this respect, it may not be deprived of it by another Nation. In this way navigators setting

upon voyages of discovery and bearing with them a commission from their sovereign, when coming across islands or other uninhabited lands, have taken possession of them in the name of their Nation; and this title has usually been respected,²⁸ provided actual possession has followed shortly after.

According to this statement, the act of discovery must be sanctioned by a commission from the sovereign, and the will of a nation to take possession must be made known sufficiently by its agent.²⁹ That this doctrine still applies is evidenced by the fact that the Island of Rockall off the west coast of the United Kingdom was formally taken in the name of Her Majesty on 18 September 1955 in pursuance of a Royal Warrant dated 14 September 1955 addressed to the Captain of Her Majesty's ship "Vidal". In 1972, the Island of Rockall Act was promulgated and Rockall was incorporated into the United Kingdom as part of the County of Inverness.³⁰

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28. Ibid., Bk. I, Ch. XVIII, p.84, para. 207. [italics added]. Mere discovery is no longer a sufficient basis for the acquisition of state territory. It must be followed by some act of appropriation amounting to assertion of intent to hold the territory. See, e.g., Island of Palmas Arbitration, II RIAA, p.831; Clipperton Island Arbitration, II RIAA, p.1105; Eastern Greenland Case, PCIJ Series A/B, No. 53. See above, 2.1.
29. These claims rested in part on ancient Roman legal theories, asserting that to obtain a right of possession required both 'a bodily act and a mental attitude'. The mental attitude was the intention to possess; the bodily act was prehensile. John Westlake, International Law, Part I (Cambridge U.P., 1910), pp. 97-98. Cf. Le Droit des Gens, Bk. I, Ch. XVIII, p.85, para. 208.
30. The Island of Rockall Act 1972 (C.2.)

That the acts should be recognised by international law, and be held sufficient to make known formally the will of a state to avail itself of a discovery, has been confirmed by Lord Stowell in The Fama. He said that 'where a title is meant to be established for the first time, some act of possession is usually done and proclaimed as a notification of fact'.³¹ In this connection, notification is to be understood in the general sense of making known,³² and not in the special sense of an express communication to other states. For example, Article XXXIV of the General Act of the Conference of Berlin of 1855 provided:

31. (1804) 5C. Robinson 115. 'A proclamation', as Lauterpacht rightly asserted, 'is a means by which a title, claimed or acquired, is announced. It is not a source of a title nor a means of acquiring it'. See H. Lauterpacht 'Sovereignty over Submarine Areas', 27 BYIL (1950), p.418.
32. The notification should describe the geographical situation and the boundaries of the occupied territories. In the Declaration of the Institute de Droit International in 1888, it provides: "La notification officielle de la prise de possession ... La notification de la prise de possession se fait, soit par la publication, dans la forme qui, dans chaque Etat, est en usage pour la notification des actes officiels, soit par la voie diplomatique. Elle contiendra la determination approximative des limites du territoire occupe". See Resolutions de L'Institute de Droit International 1873-1956, publie par Hans Wehberg (Bale: Editions juridiques et sociologiques S.A., 1957), p.68. Gaston Jeze, Etude Theorique et Pratique sur L'Occupation comme mode d'acquérir les Territoires en Droit International (Paris: V. Giard & E. Briere, 1896), pp. 270-96.

Any Power which henceforth takes possession of a tract of land on the coasts of the African Continent outside of its present possessions, or which, being hitherto without such possessions, shall acquire them, as well as the Power which assumes a Protectorate there, shall accompany the respective act with a notification thereof addressed to the other Signatory Powers of the present Act, in order to enable them, if need be, to make good any claims of their own.³³

The words of this article show that it does not require notification to be given to third parties. Nevertheless, notifications had in fact been given by some parties to the Act to a third party, the United States. By a despatch of 5 September 1885, M. Roustan informed Mr. Bayard of the annexation of Quatchis by France.³⁴ And by another despatch of 2 August 1888, Baron de Fava informed Mr. Bayard of the establishment of an Italian Protectorate over Zoula.³⁵ Both these despatches purported to be in conformity with the above Article XXXIV of the General Act, and there was no

33. Africa, No. 3 (1886). C. 4739. Roxburgh writes in 1917 that this Act 'has become, or will become, a rule of customary law'. See R.F. Roxburgh, International Conventions and Third States (London: Longmans, Green and Co., 1917), p.89.
34. U.S.F.R. (1885), p.385.
35. Ibid., (1888), Part II, p.1057. In the Clipperton Island Arbitration, Lieutenant Victor Le Coat de Keriveguen of the French Navy officially notified the Consulate of France at Honolulu that he had proclaimed French sovereignty over the island. The Consulate then informed the Government of Hawaii of this. Later, the same Consulate published in English in the journal The Polynesian, of Honolulu, on 8 December 1858, the declaration by which French sovereignty over Clipperton had already been proclaimed. 26 AJIL (1932), p.391.

suggestion in them that they were sent by courtesy, and not under conviction of legal necessity. Upon this evidence, it was concluded by Roxburgh that a usage was growing up that all members of the international community should be notified of an occupation, wherever made. However, this usage was not then universal, and was not yet a custom, because the conviction of legal necessity was still absent.³⁶ At present, it is widely accepted that this usage is now crystallised as a customary law.

What has been deemed sufficient, to make known the intention of appropriating the sovereignty, has naturally varied with the circumstances of different times.³⁷ It is widely accepted by the practice of states that the act of possession is landing, hoisting the flags, and proclaiming the significance of these acts. These ceremonies were generally regarded as being wholly sufficient in themselves

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36. Roxburgh, op. cit., p.91. Chief Justice Marshall of the United States Supreme Court held in the United States v. Percheman (1833) 7 Peters 51 that 'the usage of nations becomes law and that which is an established rule of practice as a rule of law'. See also same Court in The Paquete Habana, The Lola (1900) 175 U.S. 677, 700.
37. Bynkershoek, who was opposed to the continuance of proprietary right from discovery, unless corporal possession was maintained, subsequently qualified his view. Cornelius von Bynkershoek, De Dominio Maris Dessertatio (1774 rpt.; New York: Oxford U.P., 1923), C.1, p.353; Wolff also observes that the intention to take possession at the time of discovery must be declared. See Institutes du Droit de la Nature et des Gens, op. cit., para. CCXIII.

to establish sovereignty over the claimed land.³⁸ It was never thought that a discovery might be kept secret and benefit of it retained. Mere proclamation and unilateral declaration, needless to say, can amount to no more than 'inchoate titles', requiring some measure of occupation to perfect them.

In the following territorial adjudications there are dicta to the effect that the 'exercise of governmental functions' is the most appropriate criterion for determining sovereignty in case of dispute. Rather than providing support, however, these cases demonstrate the limitations of this criterion. For few, if any, governmental functions had been exercised by any state in the disputed areas. Not unnaturally, those territorial disputes referred to international adjudication concern remote and sparsely populated or uninhabited areas in which opportunity for exercising governmental functions would be small. These cases indicate, therefore, a serious obstacle to the application of effective occupation in international adjudication.

In the Island of Palmas Arbitration³⁹ the island in dispute was inhabited by native tribes and the question concerned whether settlement was necessary to effective

38. The formal ceremony of taking of possession, the symbolic act, was generally regarded as being wholly sufficient per se to establish immediately a right of sovereignty over, or a valid title to, areas so claimed and did not require to be supplemented by the performance of other acts, such as, for example, 'Effective offupation'. See Keller, Lissitzyn et al, op.cit., pp. 148-49.

39. II RIAA, p.829.

occupation was not precisely raised.

Normally occupation would require the setting up of some form of administration in a territory, and not simply the expression of an animus occupandi as we have discussed. In practice, the degree of state activity required to confer a valid title would depend much upon the local circumstances of each territory. In the case of uninhabited territory, the establishment of a local administration is not always necessary. International tribunals, as will be noted in the following cases, may be satisfied with very little state activity provided the other state could not make out a superior claim.

In the Clipperton Island Arbitration,⁴⁰ the arbitrator found that a single French landing on that uninhabited island in 1858, coupled with a ceremony on board a French naval vessel near the island and publication of a notice in a Hawaiian newspaper, sufficed to give France title by occupation to an island discovered in 1705 by an English adventurer, Captain Clipperton, though there was no evidence of any subsequent French steps prior to an 1897 inquiry by France regarding the conduct of three persons who were exploiting guano for an American company and who raised the American flag on the approach of a French vessel. The award stated:

 40. II RIAA, p.1108; 134 BFSP, p.842; 26 AJIL (1932), p.390;
 27 ibid., (1933), p.130; 29 ibid., (1935), p.463.

This taking of possession consists in the act, or series of acts, by which the occupying state reduces to its possession the territory in question and takes steps to exercise authority there. In ordinary cases this only takes place when the state establishes in the territory itself an organisation capable of making its law respected ... [I]f a territory, by virtue of the fact that it was completely uninhabited, is, from the first moment when the occupying state makes its appearance there, at the absolute and undisputed disposition of that state, from that moment the taking of possession must be considered as accomplished, and the occupation is thereby completed.⁴¹

It is indubitable that an administration coupled with physical and continuing occupation was not required as a condition of possession, since the island was completely uninhabited.

In the Eastern Greenland Case the need for settlement to support effective occupation was directly raised and as directly discounted by the Court. The Court acted on the principle that the true tests of sovereignty by occupation are the intention and will to act as sovereign, animus occupandi; and some actual exercise or display of sovereignty, corpus occupandi.⁴² The award in the Clipperton Island Arbitration was regarded as in complete harmony with the other cases in holding that the requisites of effective occupation depend on the circumstances of the territory and that settlement or local administration is not necessarily required in the case of uninhabited territory.⁴³ It is enough

41. 26 AJIL (1932), p.390.

42. PCIJ Ser. A/B, No. 53, pp. 45-46.

43. II RIAA, p.1106.

if the state displays its function in a manner corresponding to the circumstances of the territory, assumes the responsibility to exercise local administration, and does so in fact as and when the occasion demands.

Now there is no doubt that, in certain circumstances, a right of sovereignty may be recognised in the absence of actual control of territory. A state does not and cannot manifest governmental functions at every part of its territory in equal measure, or in some parts at all. It has always been accepted that the sovereignty of the state extends to uninhabited and uncultivated lands within its borders. If such territories are on, as distinct from within, its perimeter, then it is probable that sovereignty depends upon recognition by neighbouring states and the existence of a boundary delimited by custom or treaty. That is, a unilateral claim to sovereignty unaccompanied by the exercise of governmental functions over an area disproportionate to the area under de facto settlement and control may be treated as ineffective in international law. Policy may, however, lead to its recognition.

It may, moreover, be accepted that the 'natural boundaries' of territory claimed may set the limits to sovereignty irrespective of any manifestations of governmental control. For example, in the case of Eastern Greenland, the PCIJ accepted a Danish claim to sovereignty over the whole of Greenland on the basis of hardly more than evidence of

an intention manifested in the terms of Danish legislation to claim sovereignty.⁴⁴ It has been recognised in this case as well as in the Clipperton Island Arbitration that in thinly populated or uninhabited areas very little actual exercise of sovereign rights might be necessary in the absence of any competition.

In the Western Sahara (Advisory Opinion) Case, the Moroccan representatives argued that Morocco had been the immemorial possessor of the territory for centuries, actual authority having been exercised in accordance with the principles laid down in the Eastern Greenland Case in respect of claims to sovereignty over areas in thinly populated or unsettled countries. Morocco had invoked alleged acts of internal display of Moroccan authority and alleged that Western Sahara had always been linked to the interior of Morocco by common ethnological, cultural and religious ties. In the view of the Court, however, the information and arguments invoked by Morocco could not be considered as disposing of the difficulties in the way of its claim to have exercised effectively sovereignty over Western Sahara.⁴⁵

44. PCIJ Ser. A/B, No. 53, p.22. The total area of Greenland is 2,175,600 square kilometres; 5/6 of this area is covered by permanent 'Inland Ice', and parts only of the western coast had been settled. For details, see Isi Foighel, 'Home Rule in Greenland 1979', 48 Nordisk Tideskrift for International Ret (1979), p.4; Cf. The Greenland Home Rule Act, Act No. 577 (29 November 1978), ibid., p.10.

45. ICJ Reports, 1975, p.3, at pp. 45-47, paras. 99-103.

Finally, in connection with this basis of claim to territory it must be noted that rivers, streams, lakes and portions of the sea were also, without necessarily having regard to 'settlement' or 'use', generally regarded either as geographically forming an integral part of national territory, as adjuncts, or as natural boundaries.⁴⁶

The question naturally arises from the preceding paragraph, how much is a 'portion' of the sea? To what extent can a state determine the baseline of its territorial waters? Is there any geographical limit on unilateral claims? It will be remembered that water is held to be appurtenant to land, not land to water. When the action of waters adds to the land or when islands are formed off the coast of a state, whether by alluvium or from any other cause, they are regarded as portions of the territory.

The baseline must, of course, be 'the coast' and the coast's extent is a geographical fact, which can hardly be influenced by laws and decrees. That in certain cases the baseline is composed of the outer limits of areas of water instead of land areas is due to the fact that these areas of water are internal waters, and as such are included in the land area as parts thereof, and their outer limits are

46. When a Nation takes possession of a country with the intent to settle there, its jurisdiction extends over all that is included within the territory - land, lakes, rivers, etc. See Le Droit des Gens, op. cit., Bk.I, Ch. XXII, p.102, para. 266.

constituent parts of the coastline. The state cannot change the coast's direction by decree when it consists of a relatively straight and level land contour. Can it then change the coastline when internal waters are included therein? The Coast is by definition that place where the land and the sea meet, and no state is capable of reproducing the feat that was performed on the third day of creation, when the land and the sea were separated. Nor can it, by issuing ordinances, transform the open sea into internal waters, because it cannot alter geography. The contour of the land can be changed by constructing, for example, a pier for a port or by reclaiming land from the sea, but otherwise it appears that a coast's extent can only be changed as a result of natural events, of gradual accretion and sinking, earthquakes and volcanic eruptions, etc.

Due to the unsatisfactory and uncertain nature of the lex lata, a fresh conflict of interests, not provided for in the 1958 Geneva Conventions, has arisen and states demand the right to protect their food and energy, control their immigration and safeguard their defence. Obviously, this cannot be done with a concept of the territorial sea which has not evolved very far from the original idea of a cannon shot. The conventions are being broken more frequently now that recent advances in technology have empowered the industrial states to better exploit the resources of the sea.

State practice, as will be seen in Chapter 5, seems to assert the principle of reasonableness, that extensions of established limits require the concurrence of other states.⁴⁷

In the Beagle Channel Arbitration,⁴⁸ the record revealed that until 1892 there were no significant acts of jurisdiction specifically concerning three small islands in the Beagle Channel. This was explained by Chile on the ground that owing to the sparseness of the population and the character of the region, no exercise of authority on the islands was called for.

With regard to the question of sovereignty over the islands in the Channel, the two different approaches adopted by the parties, i.e. the 'maritime' (Argentina) and the 'territorial' (Chile) appeared to the Tribunal to lead to much the same thing.⁴⁹ The Tribunal declared that:

47. See e.g., the Anglo-Norwegian Fisheries Case, ICJ Reports 1951, p.116; Fisheries Jurisdiction Case (U.K. v. Iceland) Ibid., 1973, p.3 per Fitzmaurice; Fisheries Jurisdiction (Merits) Case, ibid., 1974, p.3 per Waldock.

48. Award of Her Britannic Majesty's Government pursuant to the Agreement for Arbitration (Compromiso) of a Controversy between the Argentine Republic and the Republic of Chile concerning the region of the Beagle Channel (London: HMSO, 1977), p.101, para. 166(a).

49. Recently, the dispute is being negotiated under Papal mediation in the Vatican, but Argentina has so far failed to follow Chile in accepting the Pope's arbitration proposals made in December 1980. These not only gave Chile the three islands but also recommended that the two countries should undertake joint development of the area's natural resources. Argentina would not accept all this. It would insist on Chile recognising the 'bioceanic principle', under which Chile takes the Southern Pacific, but Argentina the Atlantic. John Retti, "'Junta' may accept Chile Beagle claim", The Guardian, 31 March 1982, p.2; idem, "Chile denies settlement claims on Beagle Channel", ibid., 2 June 1982, p.2.

Title to territory automatically involves jurisdiction over the appurtenant waters and continental shelf and adjacent submarine areas ... 'Maritime jurisdiction' does not exist as a separate concept divorced from dependence on territorial jurisdiction. To draw a boundary between the maritime jurisdiction of states, involves first attributing to them, or recognising as being theirs, the title over the territories that generate such jurisdiction. But this once done, the maritime jurisdiction will follow from general principles of law which ... will enter into the determination of the boundary line ...⁵⁰

Thus, the question would appear to involve a boundary dispute concerning title to territory rather than the determination of the course of a maritime boundary between neighbouring states. Different criteria may apply in the case of the settlement of land boundary disputes on the one hand and maritime boundary disputes on the other. As will be seen, in the former case regard would normally be given to the factors of discovery, settlement, use, occupation and acts of sovereignty encompassing administrative activities and other manifestations sometimes included in the modes of 'effective occupation' and 'prescription'. In the case of maritime boundaries, however, geographical factors such as continuity and contiguity of territory; convenient boundary lines; economic considerations; security and history, assume greater importance, especially in the area of resource utilisation. It may be noticed that where the boundary in dispute is that between two states only, such factors will be of less significance than would otherwise be the case.

50. Beagle Channel Award, p.3, para. 6 [*italics added*].

As has already been mentioned, sea areas are, in general, however, neither inhabited nor habitable, and thus are not, within the traditional terminology of territorial acquisition, subject to effective occupation. States rights over them must therefore be based on other grounds, which can include constructive inclusion in the mainland territory, as above, or reference to analyses which confer rights less than sovereignty, or other grounds all of which are considered later in this work. Clearly uncertainty concerning the amount of territory that can be included in a claim to title, whether land or submarine territory, makes subsequent delimitation of maritime boundaries difficult, particularly once the existence of submarine mineral resources is established.

3. Occupation and Effective Occupation

3.1 Occupation

As a legal term, 'occupation' has not always received a precise and technical meaning.⁵¹ The word 'occupation', as applied to the acquisition of a territory not yet under a sovereign, is derived from the Latin occupatio,⁵² which means

51. Lindley pointed out that the method of acquiring territory in Africa was referred to generally as 'occupation', the term was used with a broad meaning equivalent to 'acquisition' or 'appropriation', and was not confined to occupation in the strict sense which applies only to territorium nullius. M.F. Lindley, The Acquisition and Government of Backward Territory in International Law (New York: Longmans, Green and Co., 1926), p.34. Cf. Ch. Salomon, L'Occupation des territoires sans maitre (Paris: A. Giard, 1889).

52. The act of taking possession of a thing belonging to no one, res nullius, but capable of being owned. J.A.C. Thomas, The Institutes of Justinian (Amsterdam: North-Holland Publ., 1975), pp. 76-77.

appropriation of a thing which belongs to no one, res nullius, but capable of being owned. In international law, occupation means the appropriation of sovereignty, not of soil; the way in which sovereignty may be acquired over terra nullius,⁵³ the right to take such action being open to all states. A state may acquire title to territory (or sovereignty over territory) by occupation. By occupation a state under contemporary international law acquires sovereignty only over the territory of which it has taken 'effective possession'.

3.2 Effective occupation

Effective occupation involves some course of administrative action of a permanent or frequently repeated character, where it is humanly possible, a permanent settlement.⁵⁴

The requirement that a nation claiming territory must show physical possession to make good its title is a principle that has been recognised by legal authorities from the earliest times.⁵⁵

53. The acquisition by a state of terra nullius has been much influenced by the Roman law. For example, the first rule of rightful acquisition is, that a person may take possession of a thing which has no owner; the second rule is, that a person may acquire rightful possession of a thing of which the previous owner has renounced possession. See Hugo Grotius, De Jure Belli ac Pacis, Vol. II, English trans. by Francis W. Kelsey (Oxford: Clarendon Press, 1925), Bk. II, Ch. III, Sec. 1, p.206; Le Droit des Gens, op. cit., Bk. I, Ch. XVIII, p.84, para. 207.

54. See above, 2.2.

55. Inst. 2, 1, 12. Bartolus de Saxoferratio says in his treatise De Insulis that 'whatever is occupied belongs to the occupant'.

The view that the delimitation of territorial sovereignty is governed by the criterion of the area effectively occupied has been a commonplace among writers on international law from Vattel to the present day. For Vattel, as has been seen, in principle the boundaries of state territory were determined by occupation, settlement and use, and it was indeed by application of these criteria that he justified the appropriation of North America by the European Powers.⁵⁶

Nevertheless, it has been equally commonplace among writers for them to modify the criteria of occupation, settlement and use to meet particular problems - although such modifications and exceptions have not usually been treated as such, nor have they been cast down as the fundamental principle. Thus, for example, both Grotius and Vattel explicitly conceded that uncultivated or uncultivable areas within the territory of a state were no less subject to its sovereignty: 'rivers, lakes, ponds, forests, and rugged mountains' together with 'deserted and unproductive soil'.⁵⁷ But the major inroads into the principle of 'effective occupation' as a criterion for the delimitation of boundaries have been caused by the considerations of potential settlement and use, security, and natural boundaries, or natural geographical units.

56. Le Droit des Gens, op. cit., Bk. I, Ch. XVIII, pp. 84-86, 207-9.

57. De Jure Belli ac Pacis, op. cit., Bk. II, Ch. II, Sec. IV, pp. 191-92.

Increasing competition for land areas available for colonisation and commercial exploitation, and perhaps higher standards of administrative responsibility, in the nineteenth century were manifested in the theoretical requirement of a higher level of activity in order to acquire sovereignty: i.e. that occupation must be 'effective'.⁵⁸ In other words, a state must take effective possession of a territory when it wants to occupy it; bring the territory under its control and administration, and be willing to maintain order, organisation, and administration of justice.⁵⁹

'Effective occupation' in the modern sense, is a term denoting not physical settlement but the actual, continuous, and peaceful display of the functions of a state. Judge Huber in the Island of Palmas Arbitration held that the test of sovereignty by occupation is the actual, continuous, and peaceful display of state functions with respect to the territory in dispute.⁶⁰ Moreover, the PCIJ in the Eastern

58. Island of Palmas Arbitration, II RIAA, p.829. See below, 3.3.1.1

59. Gustaw Smedal, Acquisition of Sovereignty over Polar Areas, English trans. from Norwegian by Chr. Meyer (Oslo: A.W. Broggers, 1931), p.32.

60. II RIAA, p.829. Titles of acquisition of territorial sovereignty in present-day international law is, inter alia, based on an act of effective apprehension. ibid., p.839. Customary international law laid down the principle that occupation, to constitute a claim to territorial sovereignty, must be effective, that is, offer certain guarantees to other states and their nationals. ibid., p.846.

Greenland Case acted on the principle that the true tests of sovereignty by occupation are the 'intention and will to act as sovereign', 'some actual exercise or display of sovereignty'. The court did not in fact use the phrase 'effective occupation' but referred to a title derived from 'continued display of authority' involving two elements, namely, animus occupandi and corpus occupandi.⁶¹ The first element seems to mean no more than that there must be positive evidence of the pretensions of a particular state to be the sovereign of the territory. The evidence may consist either of proclaimed assertions of title or acts of sovereignty. The second element further involves an actual exercise or display of sovereignty. It is recognised that these two elements need not be simultaneous, and that either may precede the other, provided that the other element is realised within a reasonable time. Thus the fundamental rule of acquisition of territorial sovereignty by occupation is the double requirement of animus and corpus. From Grotius, Vattel and Bynkershoek, through the long series of disputes

61. PCIJ Series A/B, No. 53, pp. 45-46. In the Venezuela-British Guiana Arbitration, Venezuela demended that the requirements of corpus and animus should be strictly applied to the claims of the Netherlands and Great Britain as conflicting with their good and original title. See Proceedings (Paris edition, 1899), Vol. ix, pp. 2599, 2603.

following the discoveries of the new world, to the Berlin Declaration of 1885, which, in Articles 34 and 35, gave a modern formulation to the requirement of corpus and animus,⁶² it is the same principle which ultimately asserts itself both in theory and in practice of original acquisition of territory.

3.3 Decisions of International Judicial and Arbitral Tribunals

The four major international judicial and arbitral awards which deal explicitly with the concept of 'occupation' are those in the Brazil-British Guiana Boundary,⁶³ Clipperton Island,⁶⁴ Minquiers and Ecrehos⁶⁵ and Western Sahara (Advisory Opinion)⁶⁶ Cases. In the first award, the Brazil-British Guiana Boundary Arbitration, the arbitrator examined the requirements for the occupation of territory by occupation, but held that they had not been fulfilled by either party in the greater part of the disputed area. He made an award,

62. Africa No. 3 (1886), C. 4739. The principle of effectiveness is firmly embedded in contemporary international law, and the writers use the term corpus and animus for the purpose of explaining the rules of occupation as a title of acquisition of territorial sovereignty. See H. Lauterpacht, Private Law Sources and Analogies of International Law (Archon Books, 1970), p.103. See above, Ch. 2.

63. [1904] XI RIAA, p.11.

64. [1931] 26 AJIL (1932), p.390; II RIAA, p.1105.

65. ICJ Reports, 1953, p.47.

66. ICJ Reports, 1975, p.3.

however, which was based in principle on an equal division of the territory and in detail on a natural and convenient boundary. The Clipperton Island award is, without extensive discussion of the principles of law involved, substantially based on the occupation of uninhabited island by France. The Minquiers and Ecrehos Case is however somewhat different from the Clipperton Island Arbitration which concerned the acquisition of sovereignty over res nullius; the ICJ found sovereignty lay with the exercise of legislative authority, jurisdiction and administration. In the Western Sahara Case, the Court described occupation as one of the accepted legal methods of acquiring sovereignty over territory. It considered the existence of terra nullius to be the cardinal condition for a valid 'occupation'.

From the ratio decidendi and dicta of such previous cases, the rules relating to effective occupation have been settled. To establish an effective occupation, a state must show both intention and acts of sovereignty, sufficient to confer a valid title to sovereignty, and actual, peaceful and continuous display of sovereignty. It is convenient to examine these rules in turn.

3.3.1 Intention and Acts of Sovereignty

3.3.1.1 The Brazil-British Guiana Boundary Arbitration

The boundary dispute between British Guiana and Brazil was submitted to Victor Emmanuel, the King of Italy, for arbitration. The tribunal stated that the occupation cannot be held to be carried out except by effective, uninterrupted

and permanent possession being taken in the name of the state and that a simple affirmation of rights of sovereignty or a manifest intention to render the occupation effective cannot suffice.⁶⁷

3.3.1.2 Island of Palmas Arbitration

In the Island of Palmas Arbitration,⁶⁸ sovereignty over this island in the Pacific was disputed between the Netherlands and the United States. The United States claimed sovereignty as a successor of Spain, under the Treaty of Paris which had put an end to the Spanish-American war, alleging that Spain had acquired the title to that island by discovery and occupation. However, the Arbitrator, Max Huber, took as the basis for his decision a determination of which of the parties had shown 'an actual display of sovereignty' since 'the continuous and peaceful display of territorial sovereignty is as good as a title'. He justified this position of principle on the ground that a state cannot limit itself to excluding actions of other states from a given territory, but must assume therein the functions and responsibilities of a territorial sovereign, and in particular the duty to protect in respect of that territory the rights of other states. On this basis the island was awarded to the Netherlands which had shown unchallenged 'acts of peaceful display of

67. [1904] XI RIAA, p.11, at p.21.

68. II RIAA, p.829.

sovereignty' in the critical period. Among these the Arbitrator took account of agreements made by the East India Company with native chiefs. These agreements, whatever their legal nature, were considered as facts constituting evidence of an indirect means for exercising state authority over the territory.

In this award, Max Huber emphasised the need to found title upon acts. 'Deeds speak louder than words' would be an accurate summary of his thesis, albeit lacking in the nuances of the original. Little consideration was given, on the other hand, to the role of intention in the acquisition and maintenance of sovereignty. Thus, the Arbitrator did not consider whether the acts of the Netherlands (such as they were) manifested an intention to act as sovereign. The question might have been of some importance, since the evidence was of acts of native rulers - 'vassals' of the Netherlands - and of apparently spontaneous acts of the inhabitants.⁶⁹ Passing reference alone was made to the issue whether Spain had intended, and maintained an intention,

69. It is interesting to compare this point with the Barotseland Boundary Arbitration [1905] 97 BFSP, p.504. The Arbitrator, in determining the limits of the Barotse Kingdom, adopted the test of dependency; more precisely, the exercise of governmental authority by the paramount chiefs, deposing them, deciding disputes between them and causing them to recognise his supreme authority. In applying this test, the Arbitrator took account only of the situation in 1891, and not of subsequent increases in the Barotse Chief's power. By the application of this criterion, the Arbitrator succeeded in determining which tribes were subject to the Barotse Chief, but failed to determine the precise limits of the territory of the Kingdom.

to assert sovereignty over the island. In this connection the arbitrator distinguished four territorial situations. The first, the normal situation in which territorial sovereignty is undisputed and delimited by recognised boundaries. The second, in which territorial sovereignty is disputed and the conflicting claims are based on formal titles such as cession, conquest or occupation. The third, in which a claim based on a formal title is countered by a claim based on the exercise of governmental functions in the disputed territory. And, finally, the fourth, in which a boundary contains gaps or is otherwise unclear, or the issue is whether a title is valid, not simply as between two claimants, but erga omnes, as against all states - as in the case of an island (such as Palmas) in the high seas.

In the first situation, 'effectiveness' or the display of sovereignty must, in Huber's view, be regarded as of little significance. 'Although continuous in principle, sovereignty cannot be exercised in fact at every moment on every point of a territory. The intermittence and discontinuity compatible with the maintenance of the right necessarily differ according as inhabited or uninhabited regions are involved, or regions enclosed within territories in which sovereignty is uncontestably displayed or again regions accessible from, for instance, the high seas'.⁷⁰ Moreover, the practice of states provided examples of the recognition of unilaterally delimited

70. Ibid., p.840.

boundaries in unexplored areas, the hinterland of continents. There was, however, scope for the application of the principle of prescription by which title might be acquired as a result of a 'continuous and peaceful display of the functions of a state' for a period of time.

In the second situation, 'effectiveness' was an 'element essential for the constitution of sovereignty'. Thus, titles of acquisition of territory rested in modern international law upon 'an act of effective apprehension' - by occupation or conquest - or alternatively presupposed, in the case of cession, 'that the ceding and the cessionary Power or at least one of them, have the faculty of effectively disposing of the ceded territory'.⁷¹ Similarly, title based upon natural accretion depended upon the existence of 'a portion of territory where there exists an actual sovereignty capable of extending to a spot which falls within its sphere of activity'.⁷² Nevertheless, in case of dispute in which each claim was based on some such title, sovereignty would be awarded to the claimant with 'superior' title, not necessarily determined by 'effectiveness'.

Where, however, a claimant asserts that it has actually been administering territory to which another state asserts a formal title, the disputed area should, in Huber's view, be awarded to whichever claimant was exercising governmental

71. Ibid., p.839.

72. Ibid.

functions at the date which is 'critical' for resolution of the dispute. A formal root of title, even if originally constituted or accompanied by the exercise of state functions, should not be treated as conclusive:

If the contestation is based on the fact that the other Party has actually displayed sovereignty, it cannot be sufficient to establish the title by which territorial sovereignty was validly acquired at a certain moment: it must also be shown that the territorial sovereignty has continued to exist and did exist at the moment which for the decision of the dispute must be considered as critical. This demonstration consists in the actual display of State activities, such as belongs only to the territorial sovereign'.⁷³

Similar principles applied, in Huber's opinion, to the filling of gaps, in, and clarification of, doubtful boundaries, and to territory over which title erga omnes must be established.

It is worth emphasising that Huber was not here discussing the principle of acquisitive prescription (although the Island of Palmas Arbitration is sometimes cited as an example of its application). He was concerned rather with the requirements of international law for the maintenance of title once acquired, and with its possible extinction if those requirements were not fulfilled. He was concerned, that is, with the legal consequences of an 'ineffective' display of state functions, rather than with acts of sovereignty as a means of acquiring title. Huber's reasons for linking the maintenance of territorial sovereignty to its continued and effective display were threefold: first, because in

73. Ibid.

modern international law acquisition of sovereignty is closely linked to the effective display of state functions, it seemed 'natural that an element which is essential for the constitution of sovereignty should not be lacking in its continuation'.⁷⁴ Secondly, he emphasised the positive aspect of sovereignty: the duty to protect within state territory the rights of other states, and 'without manifesting its territorial sovereignty in a manner corresponding to circumstances, the state cannot fulfil this duty'.⁷⁵ Finally, as has already been mentioned, Huber regarded it as impossible in the absence of any 'super-state organisation' to reduce territorial sovereignty to the 'category of an abstract right, without concrete manifestations'.⁷⁶ These reasons have clearly a good deal of substance: in particular, if the 'principle of effectiveness' is accepted as the determinant of title to territory, the consequences of 'ineffectiveness' must not be baulked. Equally, it may fairly be countered that under these circumstances 'title ceases to have significance ... [I]t has so to speak to be earned again at every moment of time'. This would, however, be true only of a relatively limited range of titles: only, that is, to titles to territory which have gone unrecognised by potential claimants, such as undetermined boundaries, and

74. Ibid., p.839.

75. Ibid.

76. Ibid.

titles which must be maintained erga omnes, such as islands on the high seas. In any other situation one must suppose that the exacting conditions of acquisitive prescription, if indeed this principle is admitted in international law, must be fulfilled. It is, moreover, an exaggeration to suggest that what we may term 'the principle of ineffectiveness' is incompatible with stability. If it is incompatible with the stability of territorial titles, it nonetheless preserves the stability of the existing administration of territory and is in accord with the maxim quieta non movere.⁷⁷

In the context of the Island of Palmas such problems are, nevertheless, academic. It was more than doubtful whether Spain at any time acquired title - more than an 'inchoate' title - to the island. Not merely was Spanish sovereignty never effectively exercised; it was never exercised at all. No act, however token and symbolic, was performed on the island. The only evidence in support of a Spanish claim was that the island must at least have been sighted by Spanish explorers. Spain, then, had either never acquired title, or by failing to maintain any degree of 'effectiveness' had, prior to the cession of the Philippines to the United States, lost any title to the island. But could the Netherlands be regarded as having acquired title? If it had, it must have done so by fulfilling the positive requirements of effectiveness. Huber put these requirements

77. See above, Ch. 2.

like this:

If the claim to sovereignty is based on the continuous and peaceful display of state authority, the fact of such display must be shown precisely in relation to the disputed territory. It is not necessary that there should be a special administration established in this territory; but it cannot suffice for the territory to be attached to another by a legal relation which is not recognised in international law as valid against a state contesting this claim to sovereignty; what is essential in such a case is the continuous and peaceful display of actual power in the contested region'.⁷⁸

Apart from the traditional modes of acquiring territory, Huber's view was that 'the continuous and peaceful display of state authority' is as good as a title.⁷⁹ Essential constituents of this theory were: (a) state activity or manifesting sovereignty à titre de souverain; (b) continuity over some undefined period of time, and, to the extent appropriate to the territory, over the disputed area; (c) some element of acquiescence by other states. This criterion might serve as an adequate justification for undisputed territorial sovereignty, and suffice to determine disputes such as the Island of Palmas, where the basis of a claimant's title was the exiguous one of mere discovery, but it could not serve to determine disputes in which no, or

78. II RIAA, p.857.

79. Acts of display of state authority was considered as good as a title by the Arbitral Tribunal in the Rann of Kutch Arbitration [1968] 50 ILR (1976), p.2. See above, Ch. 2.

conflicting, acts of sovereignty were asserted, or the elements of a passage of time, or acquiescence, were not fulfilled.⁸⁰

3.3.1.3 The Legal Status of Eastern Greenland Case⁸¹

The question of sovereignty over territory in Eastern Greenland contested by Denmark and Norway was submitted to the PCIJ in 1931. The Danish assertion that the Norwegian 'occupation' was invalid rested upon, inter alia, that Denmark had enjoyed and had peacefully and continuously exercised an uncontested sovereignty over Greenland for a long time, and that Norway had recognised Danish sovereignty over the whole of Greenland. Norway, however, contended that Danish sovereignty in Greenland was restricted to the areas of its colonies, and that it did not therefore extend to the area that Norway had occupied since 10 July 1931. It seems that the Court was very much influenced by the Clipperton Island and Island of Palmas Arbitrations on

80. Cf. Charles de Visscher, Theory and Reality in Public International Law, English Trans. by P.E. Corbett (Princeton U.P., 1968), pp. 204-6; Suzanne Bastid, "Les problemes territoriaux dans la jurisprudence de la cour internationale", 107 Recueil des Cours (1962-III), p.365; A.L.W. Munkman, "Adjudication and Adjustment - International Judicial Decision and the Settlement of Territorial and Boundary Disputes", 47 BYIL (1972 - 73), p.1, at p.103.

81. PCIJ Ser. A/B, No. 53, p.22. See above, Ch. 2.

sovereignty over islands. The Court defined very broadly the basic requirement for the establishment of such a title: there must be the intention and will to act as sovereign, and some actual exercise or display of such authority (although very little actual exercise of authority was necessary, especially in thinly populated or unsettled areas);⁸² and there must be no competing or stronger claim to sovereignty. The Court declared that

a claim to sovereignty based not upon some particular act or title such as a treaty of cession but merely upon continued display of authority, involves two elements each of which must be shown to exist: the intention and will to act as sovereign, and ⁸³some actual exercise or display of such authority.

Denmark thus regarded herself as possessing sovereignty over all Greenland and displayed and exercised her sovereign rights to an extent sufficient to constitute a valid title to sovereignty over all Greenland.

3.3.2 The Exercise or Display of Sovereignty Must
 be Sufficient to Confer a Valid Title to
 Sovereignty: a titre de souverain

To be of legal significance in the context of a claim to sovereignty, acts must be done with the intention of establishing à titre de souverain, i.e. as specific manifestations of sovereignty, and with the intention of asserting, or in

 82. See below, 2.2

83. PCIJ Ser. A/B, No. 53, pp. 45-46. See above, Ch. 2.

in the assertion of a claim to sovereignty.⁸⁴ This means that the manifestations of state authority relied upon in support of the acquisition of a territorial title must be carried out animus occupandi; and there must be implied a claim of sovereignty.

On acquisitive prescription, Professor Johnson rightly observes that the possession of the prescribing state must be exercised a titre de souverain, the state must base its claim upon its own acts.⁸⁵

3.3.2.1 Competing Acts of Sovereignty

In the Aves Island Arbitration between the Netherlands and Venezuela of 1865, the Arbitrator held that the Netherlands did nothing except exploit the fisheries on this island through its subjects, while Venezuela had been the first to hold an armed force there and to exercise acts of sovereignty. This action thus confirmed the dominion which it had acquired through a general title derived from Spain. Fishing for

84. Art. 1. Projet de declaration internationale relative aux occupations de territoires (7 Septembre 1888, Session de Lausanne) provides that "L'occupation d'un territoire a titre de souverainete ne pourra etre reconnue comme effective que si elle reunit les conditions suivantes:

1. La prise de possession d'un territoire enferme dans certaines limites, faite au nom du gouvernement;

2. La notification officielle de la prise de possession". See Resolution de l'Institut de Droit International 1873-1956, publie par Hans Wehberg (Bale: Editions juridiques et sociologiques S.A. 1957), p.68; D.W. Bowett, The Legal Regime of Islands in International Law (Dobbs Ferry, New York: Oceana, 1979), p.54.

85. D.H.N. Johnson, Acquisitive Prescription in International Law, 27 BYIL (1950), pp. 344-45.

turtles and gathering eggs on the Island of Aves was held as not supporting sovereignty but only signifying a temporary and precarious occupation of the island, without being an exclusive right. The island was therefore declared to be the property of Venezuela, which, however, had to pay an indemnity to the Netherlands for the loss of the fishery rights of its subjects.⁸⁶

In the Grisbadarna Arbitration, the Tribunal awarded the Grisbadarna fishing banks to Sweden because Sweden had performed various acts in the region, for instance, the placing of beacons, the measurement of the sea, and the installation of a light boat at her own expense. In so doing, Sweden not only thought that she was exercising her right but even more that she was performing her duty. Norway, however, had never taken any measures which were in any way equivalent to the placing of beacons and a light boat. It was abundantly clear that Sweden had no doubt as to her rights over the Grisbadarna and that she did not hesitate to incur the expenses incumbent on the owner and possessor of these banks even to the extent of a considerable sum of money.⁸⁷

86. (1865) J.B. Moore, International Arbitrations, Vol. 5, p.5037; La Fontaine, Pasicrisie internationale (Berne, 1902), p.152; A. de Lapradelle et N. Politis, Recueil des arbitrages internationaux, Vol. 2, (Paris, 1923), p.415; J.H. Ralston, The Law and Procedure of International Tribunals, Rev. ed. (Stanford U.P., 1926), p.315.

87. [1909]. James Brown Scott (ed), The Hague Court Reports (New York: Oxford U.P., 1916), p.122.

In the Island of Palmas Arbitration, Max Huber said that territorial sovereignty involves the exclusive right to display the activities of a state.⁸⁸ He further stated that:

the actual continuous and peaceful display of state function is ... the sound and natural criterium of territorial sovereignty.⁸⁹

Indeed the exercise of state authority was a decisive factor of the case.

In the Clipperton Island Arbitration,⁹⁰ the Arbitrator found that Mexico, although considering that the island belonged to her, had not exercised sovereignty over the island by any acts until the expedition of 1897. Thus, the award declared that the sovereignty of Clipperton Island resided in France from the 17 November 1885 onwards.

As has been seen in the Eastern Greenland Case, the PCIJ, in evaluating the activity of Denmark over Eastern Greenland during successive periods, measured it each time by reference to the question of whether the activity was 'sufficient to confer a valid title to sovereignty'. The state activity must be sufficient to show that the claimant really acted as an international sovereign would have acted in such circumstances.⁹¹

88. II RIAA, p.839. See above, Ch. 2.

89. Ibid., p.840 [*Italics added*].

90. II RIAA, p.1105; 26 AJIL (1932), p.390.

91. PCIJ Ser. A/B, No. 53. In the Island of Palmas Arbitration Judge Huber's test that activity must be sufficient to provide minimum guarantees to other states probably means much the same thing. See above, 3.3.1.2.

In the Minquiers and Ecrehos Case, the Court considered the contentions of both parties that they possessed an ancient or original title to the islands but concluded:

What is of decisive importance ... is the evidence which relates directly to the⁹² possession of the Ecrehos and Minquiers groups.

On this aspect the Court attached, in particular, probative value to the acts which related to the exercise of jurisdiction and local administration and to legislation.⁹³

It found in favour of the United Kingdom on the ground that British authorities during the greater part of the nineteenth century and in the twentieth century had exercised state functions in respect of both groups of islands.⁹⁴

In the Case Concerning Sovereignty over Certain Frontier Land,⁹⁵ the Belgians listed the disputed plots on their military staff maps and their survey records from 1847 to 1852 as acts of sovereignty. The Dutch however were able to show that they, too, put them in their surveys and collected taxes from them at local government level. Moreover, the

92. ICJ Reports, 1953, p.57. See below, 3.3.3.

93. Ibid., p.65.

94. Ibid., pp. 67, 70. In the oral proceedings Fitzmaurice adhered that the United Kingdom is in sole effective possession and invoking an ancient title and a long continuance of this possession; that all the normal manifestations of sovereignty during that period are carried out from the British side, and none from the French. These and many other factors create a virtually irresistible presumption that the islands were British at the earlier dates. ICJ Pleadings, 1953, Pt. II, pp. 94-95.

95. ICJ Reports, 1959, p.209. See below, 4.3.4.

local authority kept registers for land transfers, births, marriages and deaths for the plots. In weighing the acts of sovereignty, the ICJ ruled in Belgium's favour because of its acts at central government level.

The Island of Palmas and Eastern Greenland Cases presented not dissimilar problems, albeit on a different scale. The legal issue in both was one of sovereignty over a discrete unit of territory, an island. The Eastern Greenland Case might have been more complex, had the decision of the Court been in favour of Norway, for it would then have been necessary to determine the limits of Norwegian sovereignty in Greenland and to delimit the boundary between Norwegian and Danish territories. The Rann of Kutch Arbitration⁹⁶ is, however, the only judicial decision in which an attempt was made to apply the 'principle of effectiveness' to delimit the course of a part of an inter-state boundary. It reveals at least four problems in application which are typical of boundary disputes. First, there may be competing 'acts of sovereignty' by the claimant states in the border area. Secondly, there may be doubt as to what acts are attributable

96. 50 ILR (1976), p.2. Munkman, op. cit., 46 BYIL (1972-73), pp. 70-80. See generally, C.J. Chacko, 'The Rann of Kutch and International Law', 5 Indian JIL (1965), p.147; T.S.R. Rae, 'An Appraisal of the Kutch Award', 9 ibid. (1969), p.140; R. Khan 'Relinquishment of Title to Territory: The Rann of Kutch Award - a Case Study', ibid., p.157; R.P. Anand, Studies in International Adjudication (India: Vikas Publ., 1969), p.218; M.G. Utawale, 'The Kutch-Sind Disputes: A Case Study in International Arbitration', 23 ICLQ (1974), p.818. See below, 3.3.2.2.

to the 'state': the acts of central and local authorities may be at variance.⁹⁷ Thirdly, the activities of individuals, the local inhabitants in the area, may have to be taken into account, but their status in international law may be doubtful. Fourthly, such matters as the physical geography of the area, economic interests and national security may have to be taken into account; but again it is difficult to bring such considerations under the rubric of 'effectiveness'. Very properly, the award in the Rann of Kutch Arbitration takes all these matters into account, but they involved some significant modifications in the operation of the concept of effectiveness.

The Rann thus presented one of the characteristics which we have seen in the Island of Palmas and Eastern Greenland Cases: it was not the sort of region in which any sovereignty could be 'effective' in the fullest sense - uninviting and difficult for access and supporting no permanent human population. Equally clearly, however, each claimant state (or its predecessors) had performed some acts of administration in the Rann. Accordingly, the Chairman of the Arbitral Tribunal, Judge Lagergren emphasised that

In adjudging conflicting claims by rival sovereigns to a territory, all available evidence relating to the exercise of such rights, and the discharge of such duties, must be carefully evaluated with a view to establishing in whom the conglomerate of sovereign functions has been exclusively or predominantly vested.⁹⁸

97. See above, Ch. 2.

98. 50 ILR (1976), p.500.

This is to say that where there are competing acts of sovereignty, 'effectiveness' in the abstract cannot be determined, but the 'comparative' or 'relative effectiveness' of each claimant can be assessed.

3.3.2.2 Acts of Private Individuals

The following cases will illustrate the fact that acts of private individuals, however numerous, cannot be imputed to the state.

In the Brazil-British Guiana Boundary Arbitration the dispute was referred to the arbitration of the King of Italy. He not only recognised that 'the discovery of new channels of trade in regions not belonging to any state cannot by itself be held to confer an effective right to the acquisition of the sovereignty of the said regions by the state whose subject the person who in their private capacity made the discovery may happen to be', but also

That to acquire the sovereignty of regions which are not in the dominion of any state, it is indispensable that the occupation be effected in the name of the state which intends to acquire the sovereignty of those regions'.

In the Island of Palmas Arbitration, it was the continuous and peaceful display of 'state authority', not the 'acts of individual Dutchmen' that made Max Huber award the island's sovereignty to the Netherlands.¹⁰⁰

99. XI RIAA, p.21.

100. II RIAA, p.829.

An important dictum of the PCIJ in the Eastern Greenland Case, as has been seen, was the requirement of 'the intention and will to act as sovereign'.¹⁰¹ As only a state can have 'the intention and will to act as sovereign', it follows that the acts of authority relied upon must be those of the state as an international person, not those of mere individuals or even of subordinate divisions of the state. This implies that private individuals bearing no commission from the Government are not capable of performing valid acts of acquisition, unless their acts are immediately ratified by their Government. The same requirement excludes the possibility of acquiring title by a display of authority when the reason for the physical presence of a state in a given territory is incompatible with the quality of sovereignty, as in the case of a lease, a mandate or a trusteeship.

Since the acts must be done with the intention of establishing or manifesting sovereignty, it follows that acts by private persons, be they settlers, fishermen, traders or seacaptains, will not in themselves have legal effect in establishing sovereignty; in order that they may be used to this end, the prior authorisation of a recognised state to occupy in its name, or the subsequent ratification by such a state of the purported occupation or annexation, is required. If the proper authorities had sent out an official especially charged with the duty of making a particular acquisition, the

 101. PCIJ Ser. A/B, No. 53, pp. 45-46. See above, 3.3.1.2.

act of annexation is therefore valid. In order to annex a piece of territory a state act is necessary.¹⁰² It is axiomatic that a private person cannot perform even an inchoate annexation, any ceremony he may go through being invalid ab initio, and incapable of ratification.

As has already been shown above that private individuals, bearing no commission from their Government, are not capable of effecting legal occupation.¹⁰³ In the Anglo-Norwegian Fisheries Case,¹⁰⁴ the United Kingdom contended that it is acts of state sovereignty which may provide the foundation for a title to territorial sovereignty. Norway, however, relied on habitual fishing by the local people and prohibition of fishing by foreigners.

On the question of the status of individual action in the acquisition of title to territory, Judge McNair referred to the well-established principles in the following terms:

102. See e.g., the Clipperton Island Arbitration [1931] II RIAA, p.1105; the Minquiers and Ecrehos Case, ICJ Reports, 1953, p.65. Acts by state officials such as formal declarations of sovereignty, the exercise of criminal jurisdiction or taxation etc.

103. The United States in the Oregon dispute based a claim on an unratified discovery and occupation by private individuals. This was not admitted by Great Britain, and the question was settled by the 1946 Treaty of Washington, followed by an arbitration before the German Emperor. For details, see Twiss, The Oregon Question Examined, op. cit., passim; Wheaton's Elements of International Law, 6th English ed., Rev. by A.B. Keith, Vol. 1 (London: Stevens & Sons, 1929), pp. 345-50.

104. ICJ Reports, 1951, p.116.

some proof is usually required of the exercise of state jurisdiction ... the independent activity of private individuals is of little value unless it can be shown that they have acted in pursuance of a licence or some other authority received from their Governments or that in some other way their Governments have asserted jurisdiction through them.¹⁰⁵

Judge Hsu Mo also emphasised that 'individuals, by undertaking enterprises on their own initiative for their own benefit and without any delegation of authority by their Government, cannot confer sovereignty on the state'.¹⁰⁶

In the Minquiers and Ecrehos Case,¹⁰⁷ Jersey fishermen had visited the islands. France, after 1839, had allowed British fishermen to go peacefully to the disputed islets. Britain, however, had never allowed the French to frequent these islets. Professor O'Connell has rightly observed that in such a situation 'mere exploitation by fishermen unaccompanied by legislative and executive action, designed to render their exploitation nationally exclusive, cannot found title'. He further stated that acts of private individuals are in themselves insufficient for occupation but nevertheless there may be no occupation without them.¹⁰⁸ The Court followed this line of reasoning and thus included

105. Dissenting Opinion of Judge McNair, see ICJ Reports, 1951, p.184. Cf. The Clipperton Island Arbitration II RIAA, p.1105.

106. ICJ Reports, 1951, p.157.

107. ICJ Reports, 1953, pp. 57-59. See above, 3.3.2.1.

108. D.P. O'Connell, International Law, 2nd ed., Vol. 1 (London: Stevens & Sons, 1970), p.418.

the "actual and permanent settlement" of Britons on the islets as amounting to acts of sovereignty. In this context, Judge Levi Carneiro formulated his remarks on this question as follows:

in certain cases, and in certain circumstances, the presence of private persons who are nationals of a given state may signify or entail occupation by that state. Sovereignty is exercised over persons who recognise that sovereignty. I have in mind the fact that the limits of the Portuguese and Spanish possessions in South America, which had been strictly laid down in the Treaty of Tordesillas, were exceeded by persons from Brazil in search of gold and emeralds, and that, although these persons were frequently disappointed in their expectations and their ranks decimated by fever, they achieved the uti possidetis for Brazil and greatly increased her territory.

Such individual actions are particularly important in respect of territories situated at the border of two countries which both claim sovereignty in that region.¹⁰⁹

It seems that under certain limited circumstances the presence of private persons may signify or entail occupation of territory by a state. The passage quoted above by no means implies that purely private acts could per se create a title but that the de facto position could afford evidence of what the position was de facto.

The Rann of Kutch is a seasonally inundated salt marsh on the border between what was then West Pakistan and Gujarat in India. In the Rann of Kutch Arbitration,¹¹⁰ it was, indeed, a matter of disagreement between India and Pakistan

109. ICJ Reports, 1953, pp. 104-5 [italics added].

110. 50 ILR (1976), p.2. See above, 3.3.2.1.

whether the Rann was akin to land, or should be treated as a marine feature. Both states claimed effective control, India over the whole of the Rann, Pakistan over the northern half. During the period of British administration of India the Rann formed the boundary between the states of Sind (to which Pakistan succeeded) and Kutch (to which India succeeded). Pakistan thus derived support for its claim to have exercised 'effective and exclusive control over the northern half of the Rann' from two sources. In the period up to the British conquest of Sind in the nineteenth century, there was evidence of a broad historical trend of Sind expansion and control from the sixth century onwards, manifested in invasions and in the crossing and garrisoning of the area in the eighteenth century. In the British and post-independence period, the evidence relied primarily on acts of private individuals - cultivation, fishing and grazing of cattle on 'bets' in the Rann. In his ruling, the Chairman of the Tribunal took into account inter alia the activities of individuals - 'the inhabitants of Sind who openly used the grazing grounds for over one hundred years',¹¹¹ - and therefore those sectors (i.e. Dhara Banni and Chhad Bet) were awarded to Pakistan.

In the Western Sahara (Advisory Opinion) Case, the Court had to examine a claim by Morocco to ties of sovereignty over the territory based not on an isolated act of occupation, but upon continued display of authority on the same principles

111. 50 ILR (1976), p.510. See above, 3.2.2.2.

as those applied in the Eastern Greenland Case.¹¹² The Court found in this case that 'the paucity of evidence of actual display of authority unambiguously relating to Western Sahara',¹¹³ and the Sherifian State does not establish any tie of territorial sovereignty to Western Sahara. The Court further found that the materials before it provided indications that a legal tie of allegiance had existed at the relevant period between the Sultan and some, but only some, of the nomadic peoples of the territory.¹¹⁴

3.3.3 The Exercise or Display of Sovereignty Must be Actual

It is incontestably established in international law, both in theory and in practice: there must be a taking of possession with the intention to occupy as sovereign. This statement can only be genuine and not a mere paper claim dressed up as an act of sovereignty. Thus the Arbitrator in the Clipperton Island Arbitration said that

by immemorial usage having the force of law, besides the animus occupandi, the actual and not the nominal, taking of possession is a necessary condition of occupation. This taking of possession consists in the act or series of acts, by which the occupying state reduces to its possession the territory in question and takes steps to exercise exclusive authority there.¹¹⁵

112. ICJ Reports, 1975, pp. 42-43. See below, 4.4.

113. Ibid., p. 43.

114. Ibid., p.49.

115. 26 AJIL (1932), p.393. See above, 3.3.2.

In the Minquiers and Ecrehos Case, it may be recalled, that the Court dismissed those arguments of France and the United Kingdom which were founded upon the complexities of feudal relationships with the observation 'what is of decisive importance, in the opinion of the Court, is the evidence which relates directly to the possession of the Ecrehos and Minquiers group.'¹¹⁶

In the Rann of Kutch Arbitration Pakistan stressed that the starting point in any process of consolidation is 'actual possession, actual control, physical exercise of sovereignty. Without that, the process does not begin'. In support of this proposition, Pakistan quoted a passage from Professor Jennings, The Acquisition of Territory in International Law, to the effect that actual effective control is necessary both for the creation of a title and for its maintenance, and that the process of consolidation cannot begin to operate until actual possession is first accomplished.¹¹⁷

3.3.4 The Exercise or Display of Sovereignty Must be Peaceful

It is generally considered a condition of the acquisition of sovereignty by occupation that possession should always be

116. ICJ Reports, 1953, p.47. See above, 3.3.2.1.

117. 50 ILR (1976), pp. 105, 385. Cf. Jennings, op. cit. p.26. See above, Ch. 2.

uninterrupted and peaceful.¹¹⁸ This rule seems to mean no more than that the first assertion of sovereignty must not be a usurpation of another's subsisting occupation, nor may it be contested from the first by competing acts of sovereignty. Thus it may be noted in Michigan v. Wisconsin that the United States Supreme Court said:

long-continued, and uninterrupted possession of territory, is a doctrine not confined to individuals, but applicable to sovereign nations as well ...¹¹⁹

Similarly, in Lubeck v. Mecklenburg-Schwerin, Provisional Orders of the Staatsgerichtshof held in 1925 that:

in view of the long undisturbed possession and exercise of the rights by Lubeck and the absence of any protest by Mecklenburg-Schwerin against the Lubeck law of 1896, the application of Lubeck for a provisional order should be granted, namely, ... the regulation¹²⁰ of the rights of fishery in the Travemund Bay.

In the Clipperton Island Arbitration,¹²¹ the requirement of 'effective, uninterrupted, and permanent possession' is clearly something more than the 'peaceful and continuous display of sovereignty' applied to exiguous evidence by Max Huber in the Island of Palmas Arbitration.

118. Cf. the Island of Palmas Arbitration, II RIAA, p.831. The continuous and peaceful display of the functions of a state within a given region is a constituent element of territorial sovereignty.

119. 1926. 270 U.S., 295. See also 3 Annual Digest (1925-26), Case No. 84, p.113. Cf. Indiana v. Kentucky 136 U.S., 479; Virginia v. Tennessee, 148 U.S., 503, 522-24; Louisiana v. Mississippi, 202 U.S., 1, 53.

120. Wenzel, Die Hoheitsrechte in der Lubecker Bucht (1926), see 3 Annual Digest (1925-26), Case No. 85, pp. 114-15.

121. 26 AJIL (1932), p.390.

In the Eastern Greenland Case, the PCIJ accepted the Danish claim which, as described by the Court, was not founded upon any particular act of occupation but alleged - to use the phrase employed in the Island of Palmas Arbitration - 'a title founded on the peaceful and continuous display of state authority over the island'.¹²²

In the Falkland Islands Dispute the Argentine Republic, as successor to the state rights of Spain, has asserted inter alia that its title resulted 'from a possession uncontested and uninterrupted for fifty-nine consecutive years' (1774-1833)¹²³

In the Certain Frontier Land Case, it is true that during the years 1889 to 1892 efforts were made by the Netherlands and Belgium to achieve a regular and continuous frontier between them. A new Mixed Boundary Commission prepared a Convention which was signed by the plenipotentiaries of the two states in 1892, but was never ratified. The Court said that the unratified Convention of 1892 did not create

122. PCIJ Ser. A/B, No. 53, pp. 46, 48. As in the case of an island situated in the high seas, the question arises whether a title is valid erga omnes, the actual continuous and peaceful display of state functions is the sound and natural criterion of territorial sovereignty. II RIAA, p.840. See above, 3.3.1.2.

123. Charles Calvo, Le Droit International: Theorique et Pratique, Vol. 1 (Paris & Berlin, 1887), pp. 417-24, para. 287. Cf. David Cross, 'Centuries of Dispute: History of Sovereignty Claim', The Times, 15 April 1982, p.7. For details, see below, 5.

any legal rights or obligations, but the terms of the Convention itself and the contemporaneous events show that Belgium at that time was asserting its sovereignty over the two disputed plots, and that the Netherlands knew it was so doing. In a letter of 20 August 1890, the Belgian Minister for Foreign Affairs had informed the Netherlands Minister in Brussels that an enclave which comprised the disputed plots had been omitted from the list of territories to be ceded by Belgium to the Netherlands. The Netherlands, neither in 1892, nor at any time thereafter until the dispute arose between the two states in 1922, repudiated the Belgian assertion of sovereignty. After considering the situation for almost a century, the Netherlands made no challenge to the attribution of the disputed plots to Belgium. The Court therefore held that Belgian sovereignty over the disputed plots, established in 1843, had not been extinguished.¹²⁴

In the Chamizal Boundary Arbitration, it is clear that the United States laid claim to an area of Mexican territory on the ground of 'undisturbed' possession. This argument was rejected by the Tribunal because Mexico not only made a number of diplomatic protests but also brought effective diplomatic pressure to bear on the United States.¹²⁵

124. ICJ Reports, 1959, pp. 227, 229-30. See below, 4.3.4.

125. [1911] XI RIAA, p.309. See below, 4.3.3. Cf. Venezuela - British Guiana Boundary Arbitration (1899) No. 7, Cmd. 9533. See also Parl. Papers, Cmd. 9501, pp. 29, 45. Diplomatic protest is generally accepted by writers as a means of preventing the maturing of a prescriptive or historic title. For details, see I.C. MacGibbon 'Some Observations on the Part of Protest in International Law', 30 BYIL (1953), pp. 293-319.

3.3.5 The Exercise or Display of Sovereignty Must
be Continuous

On whatever basis the initial claim to sovereignty over territory is founded, it is evident that active and continual exercise of state authority will normally be confined to an area substantially less than that formally claimed. It must be pointed out, when explaining the inter-temporal doctrine, that the Tribunal in the Island of Palmas,¹²⁶ Eastern Greenland¹²⁷ and Minquiers and Ecrehos¹²⁸ Cases treated continuity of display of state activity as a constituent element in title by occupation, quite apart from any question of abandonment. Failure to show continuing state activity, which may also be evidence of an intention to abandon a title, will be fatal to the proof of a definitive title by occupation regardless of intention.

The degree of the continuity, like the degree of sufficiency, of the occupation varies according to circumstances. In the Island of Palmas Arbitration Judge Huber pronounced:

126. In the Island of Palmas Arbitration Judge Huber said: 'a distinction must be made between the creation of rights and the existence of rights. The same principle which subjects the act of creation of a right to the law in force at the time the right arises, demands that the existence of the right, in other words its continued manifestation, shall follow the conditions required by the evolution of law'. II RIAA, p.845. See above, 3.3.1.2.

127. PCIJ Ser. A/B, No. 53; See above, 3.3.1.3.

128. ICJ Reports, 1953, p.56. See above, 3.3.2.1; 3.3.2.2.

[I]f the contestation is based on the fact that the other Party has actually displayed sovereignty, it cannot be sufficient to establish the title by which territorial sovereignty was validly acquired at a certain moment; it must also be shown that the territorial sovereignty has continued to exist ... Although continuous in principle, sovereignty cannot be exercised in fact at every moment on every point of a territory. The intermittence and discontinuity compatible with the maintenance of the right necessarily differ according as inhabited or uninhabited regions are involved, or regions enclosed within territories in which sovereignty is incontestably displayed or again, ¹²⁹regions accessible from, for instance the high seas.

With reference to this principle, a display of sovereignty at irregular and comparatively long intervals was held to be sufficient for effective occupation both in the Island of Palmas and Eastern Greenland Cases. The Clipperton Island Arbitration may perhaps also be regarded as a correct though extreme example of the principle.¹³⁰ In the Minquiers and Ecrehos Case, Judge Carneiro stated that:

The origin of the occupation of the islands by the English being clearly defined and the circumstances confirming that occupation being (sic) acknowledged, the acts carried out during this occupation, although they are scattered in time, bear witness to the continuity of that occupation and reflect the "slow evolution" of ¹³¹the process whereby sovereignty is established.

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129. II RIAA, pp. 839-40 [italics added]. See above 3.3.1.2.
130. In contrast, in the Clipperton Island Arbitration, where the island was uninhabited, physical and continuing occupation was not required as a condition of possession. II RIAA, p.1110. See above, 2.2.
131. ICJ Reports, 1953, p.104 [italics added].

This passage is inconclusive because it is not clear whether the word 'occupation' is used as a term signifying the acquisition of sovereignty over terra nullius, or whether it refers merely to the physical presence of the English on the islets without specifying the juridical justification for their presence or the rights which might be derived from such activity.

4. Prescription and Limitation

4.1 Prescription

Title by prescription, known in the civil law as usucapio,¹³² arises from a long-continued and uninterrupted possession of property, and is thus defined by Sir Edward Coke, Praescriptio est titulus ex usa et tempore substantiam capiens ab autoritate legis.¹³³

132. In Roman law usucapio indicated ownership acquired by enjoyment through long though undefined lapse of time. Usucaption in the civil law was ownership resulting from prolonged possession. Grotius, however, rejected the usucaption of the Roman law, yet adopted from the same law immemorial prescription for the law of nations. De Jure Belli ac Pacis, op. cit., Bk. II, Ch. IV, I, VII, IX.

133. Co. Litt. 113b. Prescription is a title from use and time taking its substance from the authority of the law. There are two main categories of prescription, namely: acquisitive prescription which includes (a) immemorial possession and (b) a form of prescription akin to usucapio; and extinctive prescription.

The old Roman plea for prescription ne dominia rerum diutius in incerto essent¹³⁴ applies in the abstract with equal force to international law, and the majority of writers are agreed that international rights may be acquired and lost through the lapse of time. The doubts, however, suggested by von Martens,¹³⁵ Kluber,¹³⁶ Heffter¹³⁷ and others, as to whether the doctrine of prescription is applicable at all in international law, cannot be dismissed as entirely fanciful. The justification for the inclusion of the private law notion of prescription in international law is generally that it is conducive to the greater stability of international order since it denies validity to ineffective outdated claims.

In municipal law the prescriptive acquisition of rights is ordinarily regulated by the maxim, fraus omnia vitiat; thus guarded, the limitation which ownership undergoes for its own protection does not come into conflict with the general conscience. In international law such a reservation has no place, and the fraudulent root of title is as good as

134. Institutes of Justinian, Lib. II. Tit. VI.

135. G.F. von Martens, The Law of Nations, English trans. by W. Cobbett, 4th ed. (London: William Cobbett, 1829), Ch. 3, p.63.

136. J.-L. Kluber, Droit des gens moderne de L'Europe, Nouvelle Edition revue by M.A. Ott (Paris: Guillaumin et Cie, Libraires, 1861), pp. 6-7, para. 6.

137. A.-G. Heffter, Le droit international de L'Europe translated by Jules Bergson, Third Edition, by the Author, (Paris: Libraires du conseil d'etat, 1873), pp. 30-31, para. 13; 140-42, para. 69.

another where time has consecrated the original offence.¹³⁸
 Prescription in international law has the same rational basis as in municipal law, namely, the promotion of stability of order. Oppenheim defines prescription in international law as the acquisition of sovereignty over a territory; it must be a continuous and undisturbed exercise of sovereignty, long enough to create, under the influence of historical development, the general conviction that the present condition of things is in conformity with international order.¹³⁹

What are the conditions necessary for the acquisition of a title by prescription? It has already been noted that possession of the prescribing state must be exercised à titre de souverain and must also be actual, peaceful and continuous.¹⁴⁰

Prescription appears in international law either as a mode of acquisition and loss of territorial rights or as a rule limiting the time in which both contractual claims and

 138. The Earl of Birkenhead, International Law, 6th ed. Edited by R. Moelwyn-Hughes (London & Toronto: J.M. Dent & Sons, 1927), p.95. Cf. Le prescription liberatoire en droit international public, 31 juillet 1925, Session de la Haye, Resolutions de L'Institut de Droit International 1873-1956, published by Hans Wheberg (Bale: Editions juridiques et sociologiques S.A., 1957), pp. 8 et seq; 32 Annuaire (1925), pp. 467-87, 558-60.

139. L. Oppenheim, International Law, 8th ed. Edited by H. Lauterpacht, Vol. 1 (London: Longmans, Green and Co. 1961), p.576.

140. Cf. Reply of Mr. Fitzmaurice in the Minquiers and Ecrehos Case, ICJ Pleadings, 1953, Pt. II, pp. 364-65.

those arising out of an international tort may be put forward.¹⁴¹ While the field of application of acquisitive prescription is naturally a limited one, extinctive prescription, corresponding to limitation of action in municipal law, is of growing importance in international arbitration.¹⁴²

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141. If a state claims from another state reparation for an injury done to itself or its nationals, is that claim governed by the principle of continuity as they existed at the time of the alleged injury or by the law, customary or conventional, as it may have developed in the meantime? E. Lauterpacht (ed), Hersch Lauterpacht International Law Collected Papers, Vol. 1 (Cambridge U.P., 1970), pp. 129-34. Cf. Sir Francis Vallat, International Law and the Practitioner (Manchester U.P., 1966), p.19.
142. Prescription, both acquisitive and extinctive, so frequently rejected on account of its private law origin, is now generally recognised as forming a part of international law. See H. Lauterpacht, Private Law Sources and Analogies of International Law, p.116; Ralston, op. cit., Ch. XII, p.375, para. 683. It was held in Willaims' Case that 'prescription has a place in the international system and is to be regarded in these adjudications'. Moore, International Arbitrations, IV, p.4181, at pp. 4194-95; and see the critical note by Alberic Rolin in Recueil des Arbitrages Internationaux, by A. de la Pradelle & N. Politis, 2nd ed., Vol. II (Paris: Les Editions Internationales, 1957), p.206. In the Garcia Cadiz Case, the American-Venezuelan Claims Commission also applied the international law of prescription not because international law was regarded as the lex fori, but on the ground of international public policy. Moore, op. cit., IV, p.4199, at p.4203.

There are four concepts which may conveniently be treated under the general head of 'prescription' since they bear significant resemblances: limitation, extinctive prescription, acquisitive prescription and immemorial possession. Not all of them are necessarily found together in the same context in systems of municipal law, but in some respects they all serve similar purposes; they serve to protect and validate the title of the possessor as against the original abstract right of the owner. Obviously, however, not every possessor will be thought to deserve and require protection, so the concepts necessarily involve complexity.

4.2 Limitation:

'Limitation' in municipal law means the extinction of state claims and obsolete titles; rights of action are limited in point of time, and are lost if not pursued within due time.¹⁴³ Limitation is recognised as a 'general rule of jurisprudence'.¹⁴⁴ It is the principle that the exercise of a right of action may be barred by the passage of time. In the case, say, of a right of action to recover property, it does not involve the extinction of the property right; only the action is barred. The principle may take a number

143. R.E. Megarry and H.W.R. Wade, The Law of Real Property 3rd ed (London: Stevens & Sons, 1966), p.996.

144. See B.E. King "Prescription of Claims in International Law", 15 BYIL (1934), p.82, at p.96.

of forms.¹⁴⁵ It may take the form of prescribed time-limits for the exercise of a right of action,¹⁴⁶ or it may take the more general form of the prescription of a claim on the basis of, say, laches or supposed acquiescence.¹⁴⁷ In the case of

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145. English law knew no acquisitive prescription for land, it merely knew a limitation of actions. It has been said that every acquisition of seisin, however unjustifiable, at once begot a title of a sort, a title good against those who have no older seisin to rely upon. See Pollock and Mitland, The History of English Law, Vol. II, p.81.
146. Extinctive prescription is the prescription of rights of action directed to enforce an obligation, and is dealt with domestically by the Statutes of Limitation of Actions, whereby the remedy but not the right is barred. Extinctive prescription of personal actions is governed by the English law to which the respective obligations are subjects, a provision which may exclude the lex fori, but the law of the situation governs the extinction of real rights of action as well as the acquisitive prescription of property, whether movable or immovable. If the situation of movable property has been changed, both extinctive and acquisitive prescription is governed by the law of the place in which the time necessary for prescription is completed. Cf. Cayuga Indians Claim Case [1926] 3 Annual Digest 1925-26, p.246.
147. In the Gentini Case the claimant, seeking to recover for injuries inflicted upon him in 1871, did not appear before the Venezuelan authorities, or even ask the legation of Italy, his country, to make his demand until 1903, a period of thirty-two years from the original date of injury. The umpire pointed out the distinction between rules of prescription which were established by a government, and the principle of prescription which was well-recognised in international law. He further found that the common law writers on prescription and the cognate title of laches reached a like conclusion. 3 Venezuelan Arbitrations of 1903, p.720; see Ralston, op. cit., pp. 375, para. 683, 378, para. 687; idem 'Prescription' 4 AJIL (1910), p.133.

an original right in rem, only the action against the individual is normally barred; if the property is transferred subsequently to another individual, the right of action will normally revive.

Limitation has to be distinguished from prescription; although they are similar in terms of the end results they produce, they are different in principle. Prescription is primarily a common law doctrine, though extended by statute, by which certain rights can be acquired over the land of others.¹⁴⁸ Fundamentally it is a rule of evidence, leading to the presumption of a grant from the owner of the land and therefore of a title derived through him.¹⁴⁹ Limitation is wholly statutory, and is concerned with the title to the land itself. It simply extinguishes a former owner's right

148. In the boundary dispute between Ecuador and Peru the actual occupation of the disputed Oriente for a long period lent much weight to the Peruvian claim to the region by 'prescription'. See George Maier, 'The Boundary Dispute between Ecuador and Peru', 63 AJIL (1969), p.28, at p.30. Cf. L.H. Woolsey, 'The Ecuador-Peru Boundary Controversy', 31 AJIL (1937), p.97.

149. As evidence of its claim in the Anglo-Norwegian Fisheries Case Norway cited a number of decrees dating back to 1812 in order to prove that its practice was 'continuing'. ICJ Reports, 1951, p.135. In the boundary dispute between Ecuador and Peru, Ecuador relied on the Spanish colonial decrees of 1563, 1739 and 1740, plus the Treaty of Guayaquil in support of its de jure title. Maier, op. cit., 63 AJIL (1969), p.30. In the Eastern Greenland Case, the Court held that 'legislation is one of the most obvious forms of the exercise of sovereign power'. PCIJ Ser. A/B, No. 53, p.48. In the Minquiers and Ecrehos Case, the Court held that the legislative act was a clear manifestation of British sovereignty over the Ecrehos at a time when a dispute over such sovereignty had not yet arisen. ICJ Reports, 1953, p.66. See above, 3.3.2.1.

to recover possession of the land, leaving some other person with a title based on adverse possession. Prescription operates positively, like a conveyance; limitation operates negatively, by eliminating the claim of a person having a superior title.¹⁵⁰

4.3 Acquisitive and Extinctive Prescription¹⁵¹

Under a system of prescription, the title to property itself is extinguished or acquired. It should be noted that extinctive prescription as such merely extinguishes the right without giving any corresponding right to anyone else, whereas acquisitive prescription operates to create a new right. The merit of either system of prescription depends on the relative weight and rights of action given in different legal systems to the owner or possessor. In a legal system under which a claimant must show either that he had been dispossessed by the defendant or that he is the owner, extinctive prescription would be so inconvenient as to be unworkable.

150. Megarry and Wade, op. cit., p.996.

151. English medieval law knows no acquisitive prescription for land; all it knows is a limitation of actions. Pollock and Maitland, op. cit., p.141. For details, see Johnson, op. cit., 27 BYIL (1950), p.332; idem, 'Consolidation as a Root of Title in International Law', 13 Cambridge L.J. (1955), p.215. Cf. MacGibbon, op. cit., 30 BYIL (1953), p.307; Yehuda Z. Blum, Historic Titles in International Law (The Hague: Martinus Nijhoff, 1965), Ch. II, p.6.

Conversely, in the English legal system, which in principle gives to anyone who has lost possession without his consent an action, not merely against the dispossessor but also against any third party who has no better title than he has, extinctive prescription is all that is needed.¹⁵² To anticipate later discussion of this issue, international law is in this respect probably more akin to English law (as indeed was observed by Fischer Williams).¹⁵³ Although neither the term 'extinctive prescription' nor the not dissimilar concept of 'limitation' appears ever to have been used in international jurisprudence, the concepts of acquiescence, dereliction, preclusion and recognition have operated to similar effect.

Contrary to occupation, which relates to terra nullius, acquisitive prescription concerns acquiring territory which was subject to the sovereignty of another state. The possibility of the acquisition of territory by acquisitive prescription or adverse holding seems to have arisen or been considered explicitly in only five cases concerning territory. In none was it expressly treated as applicable to the facts, and in one it was regarded as of doubtful validity generally in international law.

152. For details see Sir William Holdsworth, A History of English Law (London: Methuen & Co. Sweet & Maxwell, 1966), Vol. III, p.166; Vol. IV, pp. 485-86; Vol. VII, pp. 69-72, 78-79, 343; Vol. XV, p.171.

153. We get in international law the same result as to the international title to territory as we have in English law as to the title to land. See Sir John Fischer Williams, 'Sovereignty, Seisin, and the League', 7 BYIL (1926), p.24.

4.3.1 Venezuela-British Guiana Arbitration¹⁵⁴

This dispute between Great Britain and Venezuela regarding the boundary of the colony of British Guiana was referred to arbitration under a compromis of 1897. The compromis laid down unusually detailed rules for the guidance of the arbitral tribunal. Article 3 provided that:

The Tribunal shall investigate and ascertain the extent of the territories belonging to, or that might lawfully be claimed by, the United Netherlands or by the Kingdom of Spain respectively at the time of the acquisition by ¹⁵⁵Great Britain of the Colony of British Guiana ...

Article 4 laid down three further specific rules, of which the first was

Adverse holding or prescription during a period of fifty years shall make a good title. The Arbitrators may deem exclusive political control of a district, as well as actual settlement thereof, sufficient to constitute adverse holding or to make title by ¹⁵⁶prescription.

The award of the tribunal is not reasoned, and examination of the actual course of the boundary with reference to the arguments of the parties affords no clear evidence that the

154. 1899. Award in Parl. Papers No. 7 (1899), c.9533; 21 Hertslet's Commercial Treaties, p.1123; La H. Fontaine, Pasierisie internationale: Histoire documentaire des arbitrages internationaux (Berne, 1902), p.556; 92 BFSP, p.160. For discussion of the award see Otto Schenrich, 'The Venezuela-British Guiana Boundary Dispute', 43 AJIL (1949), p.523; C.J. Child, 'The Venezuela-British Guiana Boundary Arbitration of 1899', 44 ibid., (1950), p.682; W.C. Dennis, 'The Venezuela-British Guiana Boundary Arbitration of 1899', ibid., p.720.

155. Art. 3 of the Treaty of Washington of 1897; see USFR (1896), p.254; 89 BFSP, p.57; 92 ibid., p.160.

156. Art. 4(a) [*italics added*].

principles of adverse holding or prescription, at any rate in the form in which they are set out in that rule, were applied or influenced the award. In fact, the evidence of the parties, as in the very similar - and partly identical - territory dealt with in the Brazil-British Guiana Boundary Arbitration¹⁵⁷ showed very little in the way of 'exclusive political control' or 'actual settlement' of the greater part of the disputed area at any date. The arguments of the parties before the Tribunal do, however, show that even in its apparently clear form expressed in the compromis the application of the principle of adverse holding or prescription was polemic. Thus, there was considerable dispute regarding the termini a quo and ad quem for the running of the fifty-year period. It was contended on behalf of Venezuela that in view of the terms of Article 3, the tribunal was only entitled to consider the possible acquisition of title by adverse possession or prescription prior to the date of the acquisition by Great Britain of British Guiana from the Netherlands. Great Britain, on the other hand, naturally enough contended that the fifty-year period would apply also to any such period subsequent to the cession of the colony. Even supposing this to be accepted, however, it would have been unclear how relevant (a) acquiescence by Venezuela, (b) the 'critical date' at which the dispute arose, and (c) the effect of subsequent agreements to maintain the administrative status quo pending agreement

 157. XI RIAA, p.11.

on the principal issue of sovereignty, would have been.

Thus, even in this case, which is the major example of the possible application of acquisitive prescription in international law, it is doubtful whether it was in fact applied; its possible application raised a number of serious problems, and was a matter of controversy between the parties.

4.3.2 Island of Palmas Arbitration¹⁵⁸

The award rendered in this case is frequently relied upon by the supporters of the doctrine of prescription¹⁵⁹ who allege that it applies in international law. In this case the arbitrator, Max Huber, had to decide whether sovereignty over the Island of Palmas (or Miangas) belonged to the Netherlands or to the United States. The United States as successor to Spain claimed that its original title to the island based on Spanish discovery and on contiguity to the Philippines. The Netherlands on the other hand, maintained that they had been exercising effective control over the island for several centuries without having encountered opposition of any kind and that consequently the legal title rested upon them. Judge Huber gave a number of reasons for rejecting the claims of the United States and found in favour of the Netherlands on the basis of 'continuous and peaceful

158. II RIAA, p.831. See above, 3.3.1.1.

159. Prescription indicates the acquisition of title by a long-continued and undisturbed possession. Cf. Dare v. Heathcote (1856) 25 L.J. Ex. 245.

display of state authority (so-called prescription)' up to the moment of the critical date in 1898 and the acquiescence by the United States. In regard to acquisitive prescription, he expressed the view that the recognition of the law-creating effect of prescription in international law is particularly necessary in view of the particular needs of the international society. He further pointed out that although municipal law is able to recognise, subject to rules of prescription and protection of property, abstract rights of property as existing apart from any material manifestation of them, 'international law ... cannot be presumed to reduce a right such as territorial sovereignty, with which almost all international relations are bound up, to the category of an abstract right, without manifestation'.¹⁶⁰ The claimant must show continuity of enjoyment.

4.3.3 Chamizal Boundary Arbitration¹⁶¹

In this dispute, in addition to its claim based on accretion, the United States had also set up a claim to the Chamizal tract by prescription 'alleged to result from the undisturbed, uninterrupted and unchallenged possession of the territory since the treaty of 1848'.¹⁶² The plea of prescription was not accepted by the commissioners. They insisted that possession maintained in the face of constant opposition had not amounted to prescription. They therefore

160. II RIAA, p.839.

161. [1911] XI RIAA, p.309. Cf. the U.S. Mexican Boundary Treaty of 1970, 23 UST, p.371. See above, 3.3.4.

162. Ibid., p.317.

unanimously rejected the United States claim based on prescription:

In the countercase of the United States, the contention is advanced that the United States has acquired a good title by prescription to the tract in dispute ... Without thinking it is necessary to discuss the very controversial question as to whether the right of prescription invoked by the United States is an accepted principle of the law of nations, in the absence of any convention establishing a term of prescription, the commissioners are unanimous in coming to the conclusion that the possession of the United States in the present case was not of such a character as to found a prescriptive title. Upon the evidence adduced it is impossible to hold that the possession of El Chamizal by the United States was undisturbed, uninterrupted, and unchallenged from the date of the treaty or the creation of a competent tribunal to decide the question, the Chamizal case was first presented. On the contrary, it may be said that the physical possession taken by citizens of the United States and the political control exercised by the local and Federal Governments, have constantly been challenged and questioned by the Republic of Mexico, through its accredited diplomatic agents.¹⁶³

Furthermore, in the view of the commissioners, the very existence of the 1884 Treaty - which had as its object the resolution of the disputes concerning the boundary

precludes the United States from acquiring by prescription against the terms of their title, and, as has been pointed out above, the two Republics have ever since the signing of that convention treated it as a source of all their rights in respect of accretion to ~~the~~ territory on one side or the other of the river.¹⁶⁴

The commissioners went on to refer to one of the obvious difficulties in applying principles of extinctive or acquisitive prescription in international law: the interruption of the running of a period of prescription by protest or force.

163. Ibid., p.328 [italics added].

164. Ibid., p.329.

They observed that another characteristic of possession serving as a foundation for prescription is that it should be peaceable:

It is quite clear from the circumstance ... that however much the Mexicans may have desired to take physical possession of the district, the result of any attempt to do so would have provoked scenes of violence and the Republic of Mexico cannot be blamed for resorting to the milder forms of protest contained in its diplomatic correspondence.

In private law, the interruption of prescription is effected by a suit, but in dealings between nations this is of course impossible, unless and until an international tribunal is established for such purpose. In the present case, the Mexican claim was asserted before the International Boundary Commission within a reasonable time after it commenced to exercise its functions, and prior to that date the Mexican Government had done all that could be reasonably required of it by way of protest against the alleged encroachment.

Under these circumstances, the commissioners thus concluded that the plea of prescription should be dismissed.¹⁶⁵ It will be noted that in this, as also in the following cases, there is a tendency to link the principles of acquisitive and extinctive prescription, with those of acquiescence and protest, to make the possible theoretical fulfilment of the conditions for acquisitive prescription dependent on the concurrent extinctive prescription of the claim of the state not in possession by dereliction, acquiescence or estoppel.

165. Ibid. 'Interruption' means some hostile obstruction and not mere non-user ... Prolonged non-user, however, may mean that there has been insufficient activity to support a claim; and, conversely, an interruption may be too intermittent to be effective. Megarry & Wade, op. cit., p.848.

4.3.4 Case Concerning Sovereignty Over Certain
Frontier Land¹⁶⁶

This case primarily concerned the interpretation of the boundary treaty of 1843 between Belgium and the Netherlands and the validity of certain acts performed by the boundary commission established under that treaty. It was a matter of dispute between the parties as to in which party that treaty vested sovereignty over certain plots of land in their border area - and the court was not unanimous on this point. In addition to relying on an interpretation of the treaty and of the acts of the boundary commission which was not accepted by the majority of the Court, the Netherlands asserted that its sovereignty over the area was established by acts of sovereignty performed since the date of the treaty, that is, adverse holding or acquisitive prescription. The Court, however, looked rather to the other side of the question: had the rights of Belgium been extinguished in action? The Court said:

This is a claim to sovereignty in derogation of title established by treaty. Under the Boundary Convention, sovereignty resided in Belgium. The question for the Court is whether Belgium has lost its sovereignty, by non-assertion of its rights and by acquiescence in acts of sovereignty alleged to have been exercised by the Netherlands at different times since 1843.¹⁶⁷

166. ICJ Reports, 1959, p.209. See above, 3.3.4.

167. Ibid., p.227.

The Court considered the evidence offered by the parties:

As to the question whether Belgium ever relinquished its sovereignty over the disputed plots, it is to be observed that Belgian military staff maps since their first publication in 1874 have shown these plots as Belgian territory. The plots were included in Belgian survey records from 1847 to 1852, when one plot for some reason was struck out but restored about 1890, since which time both have continued to appear therein.

Transfer deeds relating to one of the plots were entered in the Records of the Survey authorities at Baerla-Duc (Belgium) in 1896 and 1904.¹⁶⁸

The evidence adduced by the Netherlands was considerably more varied and weighty. The Court summarised it as follows:

The Netherlands relies, in addition to the incorporation of the plots in the Netherlands survey, the entry in its registers of land transfer deeds and registrations of births, deaths and marriages in the communal register Baarie-Nassau (Netherlands), on the fact that it has collected Netherlands land tax on the two plots without any resistance or protest on the part of Belgium.

Belgium's reply is that it was quite unaware that tax was being collected; that neither plot was under Belgian law liable to its land tax, since both plots were until recent years uncultivated and one of them was state property

Reliance is also placed by the Netherlands upon certain proceedings taken by the commune of Baerla-Duc (Belgium) before a Breda (Netherlands) tribunal in 1851. These proceedings were concerned with a proposed sale of a large area of heathland over which the commune of Baerla-Duc claimed to have certain rights of usufruct. This area included part of the disputed area.

A further act relied upon by the Netherlands is the sale by the Netherlands State, publicly announced in the year 1853, of the heathland above referred to. The Belgian Government states that the fact that this area included a part of the disputed plots escaped its notice.

168. Ibid.

The Netherlands also claims that Netherlands' laws, more particularly in regard to rents, were applied to houses built on the plots.

Finally, the Netherlands places reliance upon the grant of a railway concession which related to a length of line, a small portion of which passed through the disputed plots.¹⁶⁹

The Court, however, regarded this evidence as insufficient to displace what it regarded as the Belgian sovereignty established by treaty. It said:

The weight to be attached to the acts relied upon by the Netherlands must be determined against the background of the complex system of intermingled enclaves which existed. The difficulties confronting Belgium in detecting encroachments upon, and in exercising its sovereignty over these two plots, surrounded as they were by Netherlands territory, are manifest. The acts relied upon are largely of a routine and administrative character performed by local officials and a consequence of the inclusion by the Netherlands of the disputed plots in its Survey, contrary to the Boundary Convention. They are insufficient to displace¹⁷⁰ Belgian sovereignty established by that Convention.

The repeated emphasis which the Court gives to its holding that Belgian sovereignty over the disputed area was established by the Boundary Convention suggests that a very different view might have been taken of the weight of Netherlands' acts of sovereignty had the position under the Boundary Convention been thought to be less clear-cut. One may compare the views of Judge Sir Hersch Lauterpacht, who took the view that 'the relevant provisions of the Convention must be

169. Ibid., pp. 228-229. F.E. Krenz, International Enclaves and Rights of Passage (Geneva: Librairie E. Droz, 1961), pp. 22, 45, 100, 122, 125.

170. ICJ Reports, p.229.

considered as void and inapplicable on account of uncertainty and unresolved discrepancy'.¹⁷¹ He consequently also took a very different view of the operation of the principle of prescription in the light of the facts; he said:

it seems proper that a decision be rendered by reference to the fact, which is not disputed, that at least during the fifty years following the adoption of the Convention there had been no challenge to the exercise, by the Government of the Netherlands and its officials, of normal administrative authority with regard to the plots in question. In my opinion, there is no room here for applying the exacting rules of prescription in relation to a title acquired by a clear and unequivocal treaty; there is no such treaty. It has been contended that the uninterrupted administrative activity of the Netherlands was due not to any recognition of Netherlands sovereignty on the part of Belgium but to the fact that the plots in question are an enclave within Netherlands territory and that, therefore, it was natural that Netherlands administrative acts should have been performed there in the ordinary course of affairs. However, the fact that local conditions have necessitated the normal and unchallenged exercise of Netherlands administrative activity provides an additional reason why, in the absence of clear provisions of a treaty, there is no necessity to disturb the existing state of affairs and to perpetuate a geographical anomaly.¹⁷²

Judge Armand-Ugon in his dissenting opinion seems to have relied upon the same principle when he stated that the Netherlands had exercised preponderant governmental functions in respect of the disputed plots, without these having given rise on the part of the Belgian Government to any protest or any opposition. This prolonged tolerance of the Belgian Government has created an indisputable right of sovereignty

171. Ibid., pp. 230-231.

172. Ibid., pp.231-232 [*italics added*].

in favour of the Netherlands.¹⁷³ He further declared that the Netherlands have over a long period of years exercised effective, notorious and peaceful possession of the disputed plots, since the 1843 Convention. This constitutes further evidence of the status quo of the Netherlands recognised by the Communal Minute of 1836-1841.¹⁷⁴

4.3.5 Argentine-Chile Frontier Arbitration.¹⁷⁵

The major issue raised in this case concerned the interpretation of a prior award in 1902 covering a substantial part of the boundary between Argentina and Chile, of which the area in dispute in this case formed a small part. Neither party in fact claimed that any part of the disputed area had been acquired by 'prescription' as such for both parties relied on divergent interpretations of the 1902 Award. Evidence of administration of at least a part of the area, of the kind adduced by the Netherlands in the Sovereignty Over Certain Frontier Land Case, was offered by both parties - and in particular by Chile in respect of the period of approximately forty years preceding these proceedings - in support of claims of acting upon - and corollary acquiescence

173. Ibid., p.250. Cf. the Legal Status of Eastern Greenland Case, PCIJ Ser. A/B, No. 53. See below, 4.5.1.

174. ICJ Reports, 1959, p.245.

175. [1966] XVI RIAA, p.109. For a useful summary, see R.Y. Jennings, 'The Argentine-Chile Boundary Dispute' in International Disputes: The Legal Aspects (London: Europa, 1972), p.315; Munkman, op. cit., 46 BYIL (1972-73), pp. 33-41. See below, Ch. 4.

in - the interpretation of the boundary line in the sense contended for on the basis of the interpretation of the 1902 Award. No title by prescription independent of the award was asserted, apparently reliance on prescription would presuppose that the territory properly belonged (under the treaties or the 1902 award, or both) to the other party. This conceptual dilemma illustrates the problems raised by the failure of customary international law in theory to admit the validity of evidence of administration of territory except under the rubric of 'prescription'. This category simply cannot be applied to factual and legal situations as ambivalent as they were in this case; but, such evidence was relevant - the difficulty is to find an appropriate legal category for it.

4.4 Immemorial Possession

The concept of 'immemorial possession' is in substance a device to evade difficulties of proof. 'Immemorial' means 'beyond legal memory';¹⁷⁶ the meaning of 'possession' is a visible possibility of exercising physical control over a thing, coupled with the intention of so doing. There are, thus, three requisites of possession. First, there must be

176. Longum tempus et longus usus, qui excedit memoriam hominum, sufficit pro jure. Co. Litt. 115 a. It was well recognised that the user of easements and profits from before the time of legal memory supplied the place of a grant, and, for that reason, operated to confer a title by prescription. See Holdsworth, op. cit., Vol. VII, p.343; Megarry and Wade, op. cit., pp. 842-43; Westlake, International Law, Pt. I, p.94; Jowitt's Dictionary of English Law, 2nd ed. by John Burke (London: Sweet & Maxwell, 1977), Vol. I, p. 938; Cf. R.W.M. Dias, 'A Reconsideration of Possession', 14 Cambridge L.J. (1956), p.235.

actual or potential physical control; secondly, there must be more than mere physical control; this is not possession, unless accompanied by intention; and thirdly, the possibility and intention must be invisible or evidenced by external signs, for if the thing shows no signs of being under the control of anyone, it is not possessed.¹⁷⁷

Theory and practice, as has been seen, agree upon the rule that the territory must really be taken into possession by the occupying state. For this purpose it is necessary that it should take the territory under its sway (corpus) with the intention of acquiring sovereignty over it (animus).¹⁷⁸ Some agreements, however, explicitly exclude actual present possession from consideration unless it fulfils certain conditions. For example, the Guatemala-Honduras Convention of 1895 provided that:

Possession shall only be considered valid so far as it is just, legal, and well founded in conformity with general principles of equity, and with the rules of justice sanctioned by the law of nations.¹⁷⁹

Among the factors to be taken into consideration, it is clear that immemorial possession refers to a possession which has been so long established that its origins are now not only

177. Jowitt's op. cit., Vol. 2, pp. 1387, 1413. Cf. Munkman, op. cit., 46 BYIL (1972-73), pp. 22, 106.

178. See, e.g. The Delagoa Bay Arbitration, 66 BFSP, p.554; Clipperton Island Arbitration, II RIAA, p.1105; Island of Palmas Arbitration, II RIAA, p.831; the Legal Status of Eastern Greenland Case, PCIJ Ser. A/B, No. 53, p.22.

179. Art. 6 of the Guatemala-Honduras Convention of 1896. 87 BFSP, p.530; see also A.M. Stuyt, Survey of International Arbitrations 1794-1970 (Leiden: A.W. Sijthoff, 1972), No. 185, p.191 [*italics added*].

beyond question but also unknown. It must therefore be presumed that the possessor is entitled omnia praesumuntur solemniter esse acta.¹⁸⁰ However, Grotius was of the opinion that this is not merely a matter of presumption, but that this law was introduced by an instituted law of nations, that a possession going beyond memory uninterrupted, and not accompanied with any appeal to justice, absolutely transfers ownership.

The Lake 'Oeil de la Mer' (or 'Meerauge') Arbitration (Austria-Hungary).¹⁸¹

This case related to the course of the boundary between Galicia (formerly under Polish sovereignty) and Hungary. A reference was made to arbitration under the authority of concurrent Austrian and Hungarian law.¹⁸² The disputed territory pertaining to Hungary rested on a contract of sale of land including the disputed area of 1589, which was ratified by the Emperor in 1594. And the evidence against the Austrian claim was a declaration made by the adjoint fiscal

180. All things are presumed to have been done rightly. Co. Litt. 6. The basis of prescription is that if long enjoyment of a right is shown, the court will strive to uphold the right by presuming that it had a lawful origin. Clippens Oil Co. Ltd. v. Edinburgh and District Water Trustees [1904] A.C. 64 at 69, 70. This is understood to give title when a state of affairs exists the origin of which is uncertain and may have been legal or illegal but is presumed to be legal. See Ian Brownlie, Principles of Public International Law, 3rd ed. (Oxford: Clarendon Press, 1979), p.157.

181. 1902. Award in 8 Revue de droit international de le legislation comparee, 2nd Series, 1906, p.162, at pp. 196-212.

182. See compromis of 5 January 1897.

of Galicia before a delimitation commission, interpreted as admitting the Hungarian claim. Austria, on the other hand, relied on various public acts, including a land survey, exploration by the state of a Galician estate including amongst its dependencies the area in dispute, and the later sale of this estate in 1824. On these facts, the tribunal found this evidence inconclusive, for it showed only that sovereignty had been claimed and, at various times, exercised by both parties; nor was there any evidence of acquiescence by either party in the claim of the other.

The tribunal thus held that there had been no settlement of the frontier by agreement or any other binding act in existence between the parties. Having failed so to find, the tribunal considered the delimitation of the frontier in the light of immemorial possession. But following the finding that the area in question had been disputed for a long time, and that both parties had, for about a century and a half, exercised sovereign rights there, the requirements of immemorial possession were held to be as follows:

Immemorial possession is one which has lasted for so long a time that it is impossible to furnish the proof of a different situation and which no person can remember having heard spoken of. Besides such possession should be uninterrupted and uncontested. It goes without saying that such possession should also have lasted up to the moment when the dispute and the conclusion of a compromis took place.¹⁸³

 183. 8 Revue de droit international de la legislation comparee (1906), p.207.

Since the requirements of immemorial possession were not fulfilled, the tribunal considered that the only solution was to determine the natural frontier on the bases of equitable principles. As the tribunal required that such a situation should be uninterrompue and incontestee up to the date at which a rival claim is made and a compromis concluded, it is obvious that if such conditions are to be set such an approach can only have theoretical value insofar as it provides a legal basis for the possession of territory by states long established therein, where historical research cannot bring to light any convincing root of title, and possession has not been contested in practice. The territory in question in such circumstances is scarcely likely to be claimed by another state. In other words, as far as contentious cases are concerned, immemorial possession in such circumstances could hardly be questioned.

The point has come up incidentally in several other cases. For example, in the Grisbadarna Arbitration (Sweden-Norway), the Arbitral Tribunal held that

it is a settled principle of the law of nations that a state of things which actually exists and has existed for a long time should be changed as little as possible.¹⁸⁴

184. [1909] Award in Scott (ed) The Hague Court Reports, 1916, p.130. See above, 3.3.2.1.

In the Gulf of Fonseca Case (El Salvador v. Nicaragua)¹⁸⁵ the Central American Court of Justice held that the Gulf of Fonseca 'is an historic bay possessed of the characteristics of a closed sea', as it combines all the requisites prescribed by international law as essential, to wit, secular or immemorial possession accompanied by animo domini, both 'peaceful' and 'continuous' and by 'acquiescence' on the part of other nations.

In the Island of Palmas Arbitration, Judge Huber found that the Netherlands had a good title to the disputed island which it had 'acquired by continuous and peaceful display of state authority during a long period of time'.¹⁸⁶

In the Clipperton Island Arbitration, the Arbitrator found that Mexico's claim based on an historic right was not supported by any manifestation of her sovereignty over this uninhabited island. The regularity of the act by which France made known in a clear and precise manner, her intention to consider the island as her territory, is incontestable. For immemorial usage to have the force of law, besides the animus occupandi, the actual, and not the nominal, taking of possession is a necessary condition of occupation. He thus held that sovereignty over the disputed island belonged to France.¹⁸⁷

185. 11 AJIL (1917), p.674. See below, Ch. 5.

186. II RIAA, p.869. Beckett concluded that Judge Huber awarded the Island of Palmas to the Netherlands rather than to the United States on the basis of prescription. W.E. Beckett, 'Les Questions D'Interet General au Point de Vue juridique dans le Jurisprudence de la Cour Permanente de Justice Internationale', 50 Recueil des Cours (1934-IV), pp. 218-55.

187. 26 AJIL (1932), p.390. See above, 2.1.

In the Anglo-Norwegian Fisheries Case, the ICJ accepted that Norway had exercised the necessary jurisdiction over fjords and shores for a long period without opposition from other states, a kind of possessio longi temporis, with the result that its jurisdiction over these maritime areas must be recognised although it constituted a derogation from the rule in force.¹⁸⁸ The Court first laid great stress upon the historical aspect of the process. It then gave considerable weight to the fact that the Norwegian straight baselines system had been long 'tolerated' by other states. Thus, from the standpoint of international law, the Court regarded the Norwegian system as having its legal basis in the consent of states.¹⁸⁹

In the Western Sahara (Advisory Opinion) Case,¹⁹⁰ Morocco claimed that its legal ties with Western Sahara at the time of colonisation by Spain had been put to the ICJ as a claim to ties of sovereignty on the ground of an alleged immemorial possession of the territory. This immemorial possession was based not on an isolated act of occupation but on the public display of sovereignty, uninterrupted and

188. ICJ Reports, 1951, p.130. In his separate opinion Judge Hsu Mo stated that 'as for prohibition by the Norwegian Government of fishing by foreigners, it is undoubtedly a kind of state action which militates in favour of Norway's claim of prescription'. p.157. See above, 3.3.2.2.

189. Ibid., p.138.

190. ICJ Reports, 1975, p.12. See above, 3.3.2.2.

uncontested, for centuries.¹⁹¹ Was Morocco in possession of Western Sahara at the time of colonisation by Spain?

Judge de Castro in his separate opinion said that:

The allegation of immemorial possession does not make proof of possession unnecessary. Immemorial possession sive indefinita manifests itself as a present and evident fact, the commencement of which is unknown. It requires the fulfilment of two conditions. One condition is positive: proof of a peaceful possessio during the critical period, exercised for so long that there is no longer any memory of a time when it did not exist. The other is negative: the uninterrupted - that is to say, neither sporadic nor transitory - character of such possession.

Morocco has not attempted to prove its possession of Western Sahara at the time of the colonisation by Spain. It has sought to prove its immemorial possession by a series of isolated facts which, it has contended, established continuous possession by the Sultan of Morocco as sovereign...¹⁹²

The above decisions were partly concerned with the concept of acquisitive prescription or usucapio. They were also referred to, however, without elaborating on the essential requirements. In the light of the jurisprudence of international judicial and arbitral tribunals, it is evident that 'immemorial possession' is sometimes referred to as 'immemorial prescription', but since the element of 'adverse possession' essential to any form of prescriptive title is not definitely established, such a term only tends

191. Ibid., p.42, para. 90. In support of this claim Morocco refers to a series of events stretching back to the Arab conquest of North Africa in the seventh century A.D., the evidence mostly taken from historical work.

192. Ibid., p.154.

to confuse. Hitherto it has been difficult fully to understand the relations between 'immemorial possession' and 'prescription'. Perhaps the best explanation is that given by both P.A. Verkios¹⁹³ and D.H.N. Johnson,¹⁹⁴ who agreed that immemorial possession and prescription differed in degree, but not in kind. Nevertheless, Johnson in his well-known article "Consolidation as a Root Title in International Law", came to the conclusion that to class what he finally calls 'straight-forward possession' and 'adverse possession' together, was 'fraught with difficulties', and he would now appear to treat them separately.¹⁹⁵ On closer analysis, it is submitted that immemorial possession may be considered in two different ways which should be kept strictly apart.

First, it may be envisaged in a static form as conceived by Vattel who, distinguishing it from prescription based upon a presumption of abandonment, stated:

[I]mmemorial possession is ... an indefeasible title, and immemorial prescription is a plea which cannot be overruled; Both are founded upon a presumption which the natural law requires to be taken as an incontestable truth.¹⁹⁶

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- 193. P.A. Verykios, La prescription en droit international public (Paris, 1934), p.44.
 - 194. Johnson, op. cit., 27 BYIL, pp. 335-36.
 - 195. Johnson, op. cit., 13 Cambridge L.J. (1955), p. 215 at p.220.
 - 196. Le Droit des Gens, Bk. II, Ch. XI, p.158, para. 143. Vattel says it is the acquisition of domain founded on a long possession, uninterrupted and undisturbed, that is to say, an acquisition solely proved by this possession. Prescription, on the other hand, is the exclusion of all pretensions to a right, an exclusion founded on the length of time during which that right has been neglected. Bk. II, Ch. XI, pp. 156-57, para. 140.

Or, as Rivier puts it, it is consecration of a right rather than a mode of acquisition.¹⁹⁷ It may correspond with a mode of losing state territory.¹⁹⁸ This has already been illustrated by the Lake 'Oeil de la Mer' (or 'Meerauge') Arbitration.

Secondly, immemorial possession can be given a more dynamic interpretation to effect title when the facts are such that it is uncertain whether occupation or prescription is applicable. In this case long possession of territory would be regarded as the most important element, though there would be no need to delve into antiquity in order that the possession be 'immemorial'; in fact such a concept of immemorial possession would amount to a historical consolidation of title.¹⁹⁹

197. A. Rivier, Principes du droit des gens, Vol. I (Paris, 1896), pp. 182-83.

198. See, e.g., the Brazil-British Guiana Boundary Arbitration II RIAA, p.11; Island of Palmas Arbitration, II RIAA, p.829; Rann of Kutch Arbitration, 50 ILR, p.2. See below, Ch. 4.

199. '[C]onsolidation ... may have practical importance for territories not yet finally organized under a state regime... is not subject to the conditions specifically required in other modes of acquiring territory. Proven long use, which is its foundation, merely represents a complex of interests and relations which in themselves have the effect of attaching of territory or an expanse of sea to given state.'
Charles de Visscher, Theory and Reality in Public International Law, Rev. ed., English trans. by P.E. Corbett (New Jersey: Princeton U.P., 1968), p.209. For details, see Blum, op. cit., Ch. VI, p.241; Johnson, op. cit., 13 Cambridge L.J. (1955), p.215; Jennings, op. cit., pp. 23-28. See above, Ch. 2.

The meaning of 'historical consolidation of title' is that it is a perfection of title which originally was lacking, and which, in the course of time, is granted by a growing number of states. Ultimately, even an absolute title is granted with legal effect erga omnes.

The concept of a 'historic title' has traditionally formed the basis for national claims to appropriate maritime areas. It has, in particular, been adopted as justification for the appropriation as national territory - i.e. internal waters - of bays, gulfs and straits; for long-established claims to an unusual extent of territorial sea; and for an unusual method of delimiting the baselines from which the territorial sea is measured - for, that is, the enclosure of an unusually large area of sea within the 'internal waters' of the coastal state. Although, for the resolution of a dispute concerning a few states, it may be sufficient simply to show that the rights of the claimant state are enforceable against an objecting state, it is in the interests of all maritime states that the title be established erga omnes in claims to sea areas. There is little room for notions of 'relative' or of 'inchoate' title. The adjective 'historic' is to some extent misleading; it carries two implications: (a) that the claim must be longstanding, that a form of 'immemorial possession' must be shown. (This has misled some writers to assume that title is founded upon recognition, or on the acquiescence by states in the claim over a long period of time);

(b) it might appear that title is founded upon the principle of the 'intertemporal law', the principle that a claim to territory should be tested by the law in force at the time when the claim was first put forward. On these bases longstanding claims to maritime territory would reap the benefits of both a more generous international custom at the date of their inception, and of the subsequent passivity of the international community in face of their continued assertion.

These elements certainly play a part in the formation of title to maritime areas. The practice both of international and of municipal tribunals shows, however, that considerations of geographical propinquity, economic interests and national security play at least as important a role. This would be easily understandable in maritime areas, even if we accepted criteria such as 'possession' or 'effectiveness' in land areas. For the extent to which the authority of the coastal state can make itself felt continuously in areas which are not capable of settlement is clearly relatively slight. Moreover, sea areas, especially bays and gulfs and the inland waters of archipelagoes and coastal island fringes, are closely connected with the land domain; the exploitation of their fisheries and natural resources is of special concern and importance to the neighbouring mainland, and such areas may often be of the greatest importance for the defence of the coastal state.

CHAPTER 4OTHER MEANS OF ACKNOWLEDGING OR LOSING TITLE TO
TERRITORY1. Introduction

Limitation and acquisitive prescription - the form of prescription which gives title by usucapio - has already been described in the previous chapter. This chapter therefore deals with acknowledgement and the loss of title by prescription.

Although the concepts of acquisitive and extinctive prescription, limitation, derelictio (or abandonment), acquiescence, estoppel, protest and recognition may be distinguished in theory, the application in practice of any of these principles shows their similarities and close relationship.¹ Thus, the examples already given in Chapter 3 of discussion of the applicability of the principle of 'acquisitive prescription', have shown how closely international tribunals have linked the possible acquisition of territorial sovereignty by adverse possession with the corollary abandonment of that right (derelictio) or loss of the right through the combination of the passage of time

1. For details, see I.C. MacGibbon, 'Some Observations on the Part of Protest in International Law', 30 BYIL (1953), p.293; 'The Scope of Acquiescence in International Law', 31 ibid., (1954), p.143; 'Customary International Law and Acquiescence', 33 ibid., (1957), p.115; 'Estoppel in International Law', 7 ICLQ (1958), p.468; D.W. Bowett, 'Estoppel Before International Tribunals and its Relation to Acquiescence', 33 BYIL (1957), p.176; Lord McNair, The Law of Treaties (Oxford: Clarendon Press, 1961), Ch. 29, p.485; Antoine Martin, L'Estoppel en droit international public (Paris: Editions A. Pedone, 1979), pp. 255-330.

and acquiescence (evidenced by recognition or failure to protest), that is, extinctive prescription or limitation. In effect, international tribunals have found it necessary, in order to declare that one state has acquired territorial sovereignty, to examine first whether territorial sovereignty, has been lost. In the Certain Frontier Land and Argentine-Chile Frontier Cases it will be noticed later that the tribunals were unwilling to come to the conclusion that territorial sovereignty had been lost. A similar approach will be seen in the following cases; although they turn on the application of concepts of the category of extinctive prescription, they are put rather in terms of some form of consensual acceptance of territorial sovereignty by the parties - by way of recognition, acquiescence, or estoppel. These notions are of great significance in the determination of sovereignty over the Nansha (Spratly) and the Tiao Yu Tai (Senkaku) Islands.

2. Limitation and Extinctive Prescription: Municipal and International Legal Systems

In municipal legal systems, the concepts of limitation and extinctive prescription may reasonably be distinguished. They normally appear in the clear and straightforward form of prescribed time-limits. They take, however, more general forms which are not dependent upon the passage of strict periods of time in the concepts of derelictio, or acquiescence,

laches, and some forms of estoppel, preclusion or personal bar.² In municipal legal systems even these relatively broad concepts tend to be elaborated through relatively frequent use into technical, restrictive rules. In the international legal system, however, not only is the straightforward type of strict period of limitation or prescription lacking, but even the broader principles borrowed from municipal law for the purpose of doing justice in appropriate cases are relatively rarely referred to and are consequently technically undeveloped.³

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2. For details, see John Rankine, A Treatise on the Law of Personal Bar in Scotland Collated with the English Law of Estoppel In Pais (Edinburgh: W. Green & Son, 1921); Sir Rupert Cross, Evidence, 5th ed. (London: Butterworths, 1979), Ch. 13, p.329; Antoine Martin, L'Estoppel en droit international public (Paris: Editions A. Pedone, 1979).
 3. The Institute of International Law in its Resolution on Limitation of Actions in Public International Law states that this principle is 'long accepted in arbitral jurisprudence'. 33^e Session (La Haye, 1925), 19 AJIL (1925), p.760. In 1925, Professor Schucking thought that it would be impossible to introduce into international law rules as to the acquisition of rights by prescription, or the loss of rights by prescription, so far as concerned territory. The prevalent doctrine of international law knew nothing of institution of prescription. Professor Diena, however, thought prescription existed in international law, for example, the Caroline Islands Arbitration (1885) USFR (1886), p.776 carried out by the Holy See between Spain and Germany which related to prescription. Shabtai Rosenne (ed), League of Nations Committee of Experts for the Progressive Codification of International Law [1925-1928], Vol. I (New York: Oceana, 1972), pp. 37-38; Cf. 183-84.

The attitude of international tribunals towards the concept of prescription, in both its extinctive and its acquisitive forms, has been consistent only in its ambivalence. On the one hand, international tribunals have been loath to admit that in any individual case a state which has once acquired sovereignty over territory has subsequently lost such sovereignty by a diminution in the exercise of the normal powers of government. On the other hand - as has already been illustrated in the preceding chapter - there is a strong line of authorities in favour of awarding sovereignty over disputed territory to that claimant state which has performed - either exclusively or to a greater degree than any other claimant - acts of government over the territory. Yet a third strand of judicial decision is represented by cases which have turned less on the question of whether the original sovereignty of one claimant has been displaced by the acquisition of governmental powers in the territory by another claimant, than on concepts of acquiescence, laches or limitation and presclusion or estoppel. These latter concepts have, as will be seen, operated in either direction, i.e., both in favour of and against the state exercising governmental powers in the disputed territory.

3. Recognition, Acquiescence, Estoppel and Protest

It has already been observed, in noting the approach of international tribunals to the concept of acquisitive prescription, that claims that territorial sovereignty has been acquired by adverse prescription have in general been

considered from the converse viewpoint; as raising the issue of whether territorial sovereignty has been lost or extinguished. For this reason it is certainly arguable that the theoretical orientation of international law is towards a system of extinctive prescription rather than one of acquisitive prescription - if it is to be assumed that any legal system requires one system or the other. Emphasis on 'possession' or the effective exercise of governmental authority also lends support to this view. But if this is correct in international legal theory, it is nevertheless by no means easy to predict its practical application. For if we cannot point to one international judicial decision in which the concept of acquisitive prescription - sovereignty acquired by possession adverse to a pre-existing sovereign - has been applied (as distinct from discussed), neither can we instance a case in which a judicial tribunal has unequivocally held that title to territory once established has thereafter been extinguished. In general, the problem has been elided in the cases. Take the Clipperton Island Arbitration, for example; the arbitrator denied that Spain, upon whose pre-existing title Mexico relied, had ever effectively acquired territorial sovereignty prior to the French claim.⁴ In the Island of Palmas Arbitration Max Huber invoked the concept of an 'inchoate' title, which, although it might comprehend certain rights, might be displaced by

 4. II RIAA, p.1105. See above, Ch. 3.

a subsequent effective possession.⁵ By prescription, the extinction of a right which has been tacitly renounced by action which proves the consent.

In the Chamizal Boundary Arbitration,⁶ the possible extinction of Mexican sovereignty over the disputed areas was treated as turning not upon the facts of possession, but upon the evidence for Mexican 'acquiescence' in that possession and the significance of 'protest' as a bar to the acquisition of title by adverse possession. And in the Eastern Greenland Case the PCIJ emphasised the precedence of animus over corpus,⁷ of the spirit over the flesh, to a degree implying the incorporation of the Manichean heresy into international law.

Two major decisions on territorial disputes turn fundamentally on the application of principles of this category: the decision of the PCIJ in the Eastern Greenland Case, and the decision of the ICJ in the Temple of Preah Vihear Case. There has, moreover, been a relatively recent predeliction of which the decision of the ICJ in the Temple of Preah Vihear Case is the major example for the application to international legal - and more particularly territorial - issues of the principles of 'estoppel' (or 'preclusion') and 'acquiescence'. Dicta in the North Sea Continental Shelf

5. II RIAA, p.831. See above, Ch. 3.

6. I RIAA, p.309. See above, Ch. 3.

7. PCIJ Series A/B, No. 53, p.22. See above, Ch. 3.

judgment, and also in the Argentine-Chile Frontier, Rann of Kutch and the Beagle Channel awards, suggest that this trend may be on the wane. It is abundantly clear that a broad principle employed as a catch-all basis of decision can be harmful, since it may work injustice in particular cases and be also inimical to the development and elaboration of rules of law.

3.1 Legal Status of Eastern Greenland Case (Denmark v. Norway)⁸

In this case, the principles of recognition of territorial claims and estoppel in particular, merit further attention.

Let us now examine them as follows:

3.1.1 Recognition

The pliability of recognition as a general device of international law makes recognition an eminently suitable means for the purpose of establishing the validity of a territorial title in relation to other states.⁹ The concept of recognition of Danish sovereignty over Greenland by third states was considered, both in the form of incidental 'recognition' in treaties dealing with other matters and in the more direct form of responses to the explicit request for recognition made by Denmark between 1915 and 1921; second, the effect of recognition by Norway of Denmark's claims to the whole area of Greenland was also considered.

8. PCIJ Ser. A/B, No. 53, p.22.

9. Judge Hsu Mo's separate opinion in the Anglo-Norwegian Fisheries Case, ICJ Reports, 1951, p.157; Judge McNair's dissenting opinion, ibid., p.184; see also Judge Levi Carneiro's individual opinion in the Minquiers and Ecrehos Case, ICJ Reports, 1953, pp. 104-5.

On reading the judgment of the Court it is difficult to escape the conclusion that recognition of Danish sovereignty by the major powers played a considerable part in the decision which the Court reached. The majority of the interested states such as France, Japan, Italy, Great Britain and Sweden show that they agreed to recognise that the Danish sovereignty extended to the whole of Greenland.¹⁰ The fact of such recognition, together with its concomitant that no other claim to Greenland had been made before that of Norway in 1931, was repeatedly emphasised by the Court. Perhaps because there is no easy category of international law which gives such recognition relevance, the Court rarely explicitly stated the relevance of this evidence, and to what extent it was effective against Norway. Logically, even if accumulated recognitions were not regarded as a mode of conferring title by the international community, and ipso facto opposable to even non-recognising states, they still could not be dismissed as wholly irrelevant to any dispute over sovereignty. If it does not confer title, recognition affords at least indirect or circumstantial evidence of a situation of fact, i.e. that a particular state is, because it is regarded by other states as administering, in fact

10. See e.g., the French reply on 31st March 1920, the Japanese reply on 24th June 1920, the Italian reply on 29th June 1920, the British reply on 6th December 1920, and the Swedish reply on 28th January 1921. PCIJ Ser. A/B, No. 53, pp. 58-60. See also Judge Anzilotti's dissenting opinion, ibid., pp. 81-82.

administering a certain territory. It is not evidence of sovereignty, but evidence of the exercise of sovereign rights.

On the negative side, it also no doubt estops, at least in certain circumstances, the recognising state from itself laying claim to the administration of the same territory. Also, it affords evidence that the state which is 'recognised' does claim sovereignty over the area in question.

With respect to a series of commercial conventions concluded by Denmark which contained stipulations to the effect that they should not apply to Greenland, the Court said:

The importance of these treaties is that they show a willingness on the part of the States with which Denmark has contracted to admit her right to exclude Greenland ... The importance of these conventions ... is due to the support which they lend to the Danish argument that Denmark possesses sovereignty over Greenland as a whole [and] To the extent that these treaties constitute evidence of recognition of her sovereignty over Greenland ⁱⁿ general, Denmark is entitled to rely upon them.

But the Court did not state what impact such recognition has on the legal problem of title. Similarly, in considering the Danish requests for recognition of sovereignty over Greenland from 1915 to 1921, the Court, although emphasising that such recognition was granted by all those states of which it was requested except Norway, nevertheless treated these declarations in the context of estoppel only: as evidence, that is, of Denmark's claims and representations.

3.1.2 Estoppel

When an estoppel binds a state to an international litigation it is prevented from placing reliance on or denying the existence of certain facts.¹² Although recognition and estoppel are technically distinct concepts, they inevitably become confused in practical use. In theory either recognition is 'constitutive' or 'declaratory':¹³ in territorial disputes it may then be regarded as constitutive of title or declaratory of a pre-existing title. It may be thought of as unambiguously constitutive in a case, for example, where sovereignty over a certain territory is recognised in a treaty of cession; or as purely declaratory where the pre-existing situation is unambiguous. But in any dispute the pre-existing situation or the situation which might be created by the act of 'recognition', is unlikely to be unambiguous. In the context of any individual disputes 'recognition' is perhaps best regarded not as having of itself substantive legal consequences but as evidence of a factual situation or as creating an estoppel.

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12. A state party to an international litigation is bound by its previous acts or attitude when they are in contradiction with its claims in the litigation. Separate opinion of Vice-President Alfaro, the Temple of Preah Vihear Case, ICJ Reports, 1962, p.39.
 13. For details, see Sir Hersch Lauterpacht, Recognition in International Law (Cambridge U.P., 1947); Oppenheim, International Law, op. cit., p.124; D.P. O'Connell, International Law, Vol. 1, 2nd ed. (London: Stevens & Sons, 1970), p.127; H. Blix, 'Contemporary Aspects of Recognition', 130 Recueil des Cours (1970-II), pp. 587-704; L.L. Kato, 'Recognition in International Law: Some Thoughts on Traditional Theory, Attitudes and Practice by African States', 10 Indian JIL (1970), pp. 299-323; James Crawford, 'The Criteria for Statehood in International Law', 48 BYIL (1976-77), p.93; C.R. Symmons, 'United Kingdom Abolition of the Doctrine of Recognition of Governments: A Rose by Another Name?' Public Law (1981), p.249.

In this case, one of the peculiar features was that until 1931 there was no claim by any state other than Denmark to sovereignty over Greenland. Indeed, up to 1921 no state had ever disputed the Danish claim to sovereignty.¹⁴ Moreover, the Court considered the various acts of the Norwegian Government as 'undertakings which recognised Danish sovereignty over all Greenland'. These were, first, the 'Holst Declaration' formally made by the Minister for Foreign Affairs of Sweden and Norway shortly after the cession of Norway to Sweden under the Treaty of Kiel, abandoning Norwegian claims to Greenland in favour of Denmark;¹⁵ second, a number of bilateral and multilateral agreements in which Greenland is described as a 'colony' or a 'part' of Denmark;¹⁶ and third, the 'Ihlen Declaration' of 22 July 1919 that 'the plans of the Royal [Danish] Government respecting the sovereignty of Denmark over the whole of Greenland ... would meet with no difficulties on the part of Norway'¹⁷ was binding on Norway and barred a subsequent

14. PCIJ Ser. A/B, No. 53, p.46.

15. Ibid., pp. 64-66. The Convention of 1st September 1819, signed by the King of Sweden and Norway in his capacity as King of Norway and the King of Denmark, stated that 'everything in connection with the Treaty of Kiel' of 1814, which inter alia reserved Greenland to Denmark, was to be regarded as completely settled. Ibid., pp. 66-68.

16. Ibid., pp. 68-69. For discussion, see Bowett, op. cit., 33 BYIL (1957), pp. 182, 185; MacGibbon, op. cit., 7 ICLQ (1958), p.468; McNair, op. cit., p.485.

17. PCIJ Ser. A/B, No. 53, pp. 36, 69-71.

Norwegian attitude contrary to its notified intent. From the Ihlen Declaration, the Court reached the conclusion that Norway had debarred herself (or was 'under an obligation to refrain') from contesting a historic Danish sovereignty extending over the whole of Greenland:¹⁸

In these circumstances, there can be no ground for holding that, by the attitude which the Danish Government adopted, it admitted that it possessed no sovereignty over the uncolonised part of Greenland, nor for holding that it is estopped from claiming ... that Denmark possesses an old established sovereignty over all Greenland.¹⁹

The application of the principle of estoppel, in this case, is not necessarily conclusive as regards the facts admitted: its force may vary according to the circumstances. Similarly in the Anglo-Norwegian Fisheries Case, the ICJ considered that the 'prolonged abstention' of the United Kingdom from protesting against the Norwegian system of straight baselines in delimiting territorial waters was one of the factors which, together with the general tolerance of the international community, estopped the United Kingdom's action.²⁰

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18. Ibid., pp. 68-69. It is noteworthy that there are universal requirements which limit the operation of the doctrine of estoppel by conduct. The first requirement is that the estoppel must relate to existing fact. The second requirement of an estoppel by conduct is that it should be unambiguous. The third requirement is that an estoppel cannot be relied on if the result of giving effect to it would be something that is prohibited by the law. Cross, op. cit., p.351.
 19. PCIJ Ser. A/B, No. 53, p.62 [*italics added*].
 20. ICJ Reports, 1951, p.138. Cf. the Minquiers and Ecrehos Case, ICJ Reports, 1953, p.71; the Temple of Preah Vihear Case, ICJ Reports, 1962, pp. 21-24.

3.2 Case Concerning the Temple of Preah Vihear (Cambodia v. Thailand)²¹

This was an important dispute over territorial sovereignty. The basic issue was the question of whether the Temple of Preah Vihear was situated in territory under the sovereignty of Cambodia or under that of Thailand. The area in dispute is described thus in the judgment of the ICJ:

The Temple of Preah Vihear is an ancient sanctuary and shrine situated on the borders of Thailand and Cambodia. Although now partially in ruins, this Temple has considerable artistic and archaeological interest, and is still used as a place of pilgrimage. It stands on a promontary of the same name, belonging to the eastern sector of the Dnagrek range of mountains, which in a general way, constitutes the boundary between the two countries in this region - Cambodia to the south and Thailand to the north. Considerable portions of this range consist of a high cliff-like escarpment rising abruptly above the Cambodian plain. This is the situation at Preah Vihear itself, where the main Temple buildings stand in the apex of a triangular piece of high ground jutting out into the plain. From the edge of the escarpment, the general inclination of the ground in the northerly direction is downwards to the Nam Moun river, which is in Thailand.

Up to 1904, this area, together with a great part of the Cambodian plain, was in the possession of Siam (now Thailand).²²

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21. ICJ Reports, 1962, p.15. For discussions, see D.H.N. Johnson, 'The Case Concerning the Temple of Preah Vihear' 11 ICLQ (1962), p.1183; Cedric Thornberry, 'The Temple of Preah Vihear (Cambodia v. Thailand)', 26 Modern LR (1963), p.448; K. Krishna Rao, The Preah Vihear Case and the Sino-Indian Boundary Question, The Sino-Indian Boundary Question and International Law, No. 1 (The Indian Society of International Law, 1963).
22. For a discussion of the historical background see G.M. Kelly, 'The Temple Case in Historical Perspective', 39 BYIL (1965), pp. 462-472; Alastair Lamb, Asian Frontiers: Studies in a Continuing Problem, (London: Pall Mall, 1968), pp. 159 et seq. Cf. Jean-Pierre Cot, 'Affaire du temple de Preah Vihear', Annuaire Francais de Droit International (1962), p.217.

During the period, Cambodia came under French rule and the delimitation of the Cambodia-Thailand frontier was effected by a series of treaties to which France and Siam were parties. The reversal of the roles of the parties on either side of the frontier is strikingly evident in the fact that these treaties provided for a steady but dramatic regression of the actual frontier, to the benefit of Cambodia.

The Franco-Siamese Treaty of 13 February 1904, which delimited the frontier in the region of Preah Vihear, provided as follows:

The frontier between Siam and Cambodia starts on the left shore of the Great Lake, from the mouth of the river Stung Roluos it follows the parallel from that point in an easterly direction until it meets the river Prek Kompong Tiam, then, turning northwards, it merges with the meridian from that meeting-point as far as the Pnom Dang chain. From there it follows the watershed between the basins of the Nam Sen and the Mekong, on the one hand, and the Nam Moun on the other hand, and joins the Pnom Padang chain the crest of which it follows eastwards as far as the Mekong. Upstream from that point, the Mekong remains the frontier of the Kingdom of Siam, in accordance with Article 1 of the Treaty of 3 October 1893.²³

The Thai-Cambodian boundary in the relevant sector of the Dangrek range, separating the Korat Plateau in Thailand from the Cambodian plains, was therefore to be a watershed line between two river basins. It was further provided that the 'delimitation' (more properly, perhaps, 'demarcation') of the frontier should be carried out by a French-Siamese Mixed Commission under articles 1 and 2.²⁴

23. Article 1 of the Franco-Siamese Treaty of 15 February 1904, see de Martens, Rec. de Tr. Second Series, Vol. 32 p.130; ICJ Reports, 1962, p.16; ICJ Pleading, 1962, Vol. 1, p.5 [italics added].

24. Article 3.

It is not clear whether the boundary in the Preah Vihear section was in fact demarcated by the Mixed Commission. The French and Siamese chairmen of their respective sections of the Mixed Commission visited the area in 1906-1907; maps were produced by the French members of the Commission to whom the task of mapping the area had been entrusted in 1907 by the Siamese, who themselves lacked the requisite topographical and cartographical expertise. There was, however, no record of any meeting of the Mixed Commission approving any demarcation. A second Mixed Commission was set up under a further boundary treaty of 1907 to demarcate a further adjacent sector of the Dangrek range; this seems to have assumed that the Preah Vihear section had already been demarcated. Maps of the frontier as prepared by a team of four French surveyors - Colonel Bernard and Captains Tixier, Kerler and de Batz - were published in France by a French cartographical firm, H. Barrere, with the line of the boundary marked on them, and were communicated in due course to the Siamese Government. They included a map of the Preah Vihear section of the Dangrek range with the boundary marked on it, and headed 'Dangrek-Commission of Delimitation between Indo-China and Siam'. This 1907 map appeared to have indicated the boundary wrongly by placing the Temple of Preah Vihear on the Cambodian side of the frontier.

The Siamese Government and, later, the Thai Government, had by their conduct apparently accepted the map frontier line, and had not shown that any special importance was attached to the watershed line. Cambodia mainly relied on these 1907 maps in support of her claim to sovereignty over the Temple. Thailand,

on the other hand, contended that the map, not formally being the work of the Mixed Commission, was not binding; that the 1907 map embodied a material error (the frontier line indicated on it was not the true watershed line); that she had never accepted this map; and that, if she had ever done so, it was only because of the mistaken belief that the frontier line shown in the map was the true watershed line.²⁵

In view of the following facts, the Court found as clear proof of the intention of the parties:

- (i) the wide publicity given to the map by the Siamese authorities;²⁶
- (ii) the silence of the Siamese members of the Mixed Commission on the inaccuracy of the map;²⁷
- (iii) Prince Damrong, the Siamese Minister of the Interior, acknowledged the receipt and recognized the character of these maps;²⁸

25. ICJ Reports, 1962, p.21.

26. Ibid., p.23.

27. Ibid., p.24.

28. Prince Damrong thanked the French Minister in Bangkok for the maps and asked him for another fifteen copies of each of them for transmission to the Siamese provincial governors. Ibid., p.24; Judge Wellington Koo, In his dissenting opinion, considered that the Siamese Prince Damrong, who expressed appreciation to the French for copies of the map, was displaying a mere act of normal courtesy which 'cannot reasonably be considered to support a legal presumption of Siam's acceptance of the boundary line marked on map Annex 1'. Ibid., pp. 84, 90. However, in his separate opinion, Judge Fitzmaurice averred that the burden of demonstrating such an acceptance by Thailand lay with Cambodia and, though 'acceptance by conduct alone of an obligation in the nature of a treaty obligation is not lightly to be presumed, especially where a frontier is concerned', in his view, and in that of the majority, there was ample evidence of acceptance. Ibid., p.58.

- (iv) the silence of the Siamese members of the Commission of Transcription, made no suggestion that the Annex 1 map or line was unacceptable;²⁹
- (v) the Annex 1 map, presumably, was seen by the Governor of Khukhan province, the Siamese province adjoining the Preah Vihear region on the northern side, who remained silent.³⁰

Since all these Siamese authorities - Prince Devawongse, the Minister of Foreign Affairs, Prince Damrong, the Minister of the Interior, the Siamese members of the First Mixed Commission and the Siamese members of the Commission of Transcription - did not make any reservation or raise any query about the accuracy of the Annex 1 map, either then or for many years, they must thereby be held to have acquiesced. It may be of interest to compare this point with the criterion adopted by the PCIJ in the Eastern Greenland Case. The Court held:

a reply of this nature given by the Minister for Foreign Affairs on behalf of his Government in response to a request by the diplomatic representative of a foreign Power, in regard to a question falling within his province, is binding upon the country to which the Minister belongs.³¹

A Minister of Foreign Affairs, acting within the scope of his departmental affairs, is therefore in a position to bind his country by a declaration or statement made to the representative of a foreign state. Judge Anzilotti, in his dissenting opinion,

29. Ibid., p.24.

30. Ibid., p.25.

31. PCIJ Ser. A/B, No. 53, p.71.

also recognised that the Minister of Foreign Affairs, as the direct agent of the head of the state, had the authority to make statements which are binding upon the state.³²

The delivery of the map called for some reaction on the part of the Siamese authorities if they were not to be held to have agreed. Instead, the Court said that its receipt had at the time been acknowledged and that its character had been recognised by Siam. In the application of the principles underlying acquiescence, recognition and estoppel, the Court declared: 'Qui tacet consentire videtur si loqui debuisset ac potuisset'³³ By its silence, which amounted to acquiescence³⁴ or implied acceptance of the map line, and only on this basis, Thailand was precluded or estopped by her conduct from now rejecting the validity of this line as the boundary line.³⁵

32. Ibid., p.91.

33. ICJ Reports, 1962, p.23. He who is silent is deemed to consent. Assent to an infringement of rights, either express or implied from conduct, by which the right to equitable relief is normally lost. Cf. Jenks, Cent. 32.

34. In a separate opinion, Vice-President Alfaro said it was a general principle of law which had been frequently applied by International Tribunals that "a State party to an international litigation is bound by its previous acts or attitude when they are in contradiction to its claims in the litigation". ICJ Reports, 1962, p.39. Cf. J.D. Heydon, 'Silence as Evidence', 1 Monash University L.R. (1974), p.53.

35. In Judge Wellington Koo's view, the application of the principle of preclusion against Thailand was not justified because Thailand had not made a statement at any time indicating her acceptance or recognition of the frontier marked on the Annex 1 map. As regards the allegation that her silence amounted to her acceptance or recognition, it is plainly contradicted by evidence of sustained state activity in the exercise of sovereignty in the Temple area ... for over forty years, no such reliance appears to have been placed by France on the alleged binding character of the said map. ICJ Reports 1962, p.97.

The Court further held that:

Even if there were any doubt as to Siam's acceptance of the map in 1908, and hence of the frontier indicated thereon, the Court would consider, in the light of the subsequent course of events, that Thailand is now precluded by her conduct from asserting that she did not accept it ... It is not now open to Thailand, while continuing to claim and enjoy the benefits of the settlement, to deny that she was ever a consenting party to it.³⁶

In this case Thailand had several opportunities to raise with the French authorities the question of the Annex I map. These consisted of occasional archaeological visits. In 1930, for example, Prince Damrong, the former Minister of the Interior and President of the Royal Institute of Siam, visited the Temple in a quasi-official role. He was received at Preah Vihear by the French resident for the adjoining Cambodian province which, on behalf of the Resident Superior, acted as the host country with the French flag flying. A clearer affirmation of title on the French Indo-Chinese side can scarcely be imagined; it demanded a reaction, but Thailand made no protest.³⁷

In 1937 Thailand, making its own survey of the area, became aware that the watershed in the immediate vicinity of the Temple did not run on the Thai side but on the Cambodian side, roughly following the escarpment.³⁸ It made, however, no

36. Ibid., p.32 [italics added].

37. Ibid., p.30. Indeed, Prince Damrong had subsequently communicated with the French Resident in language which seemed to admit of the construction that French sovereignty was acknowledged.

38. Thailand produced a map of her own in 1937, showing Preah Vihear as being in Cambodia. Ibid., pp. 27-28.

representations to France on the issue and indeed, continued to reproduce and use maps showing the Temple as being within Cambodian territory without any express reservation. In the Argentina-Chile Boundary Arbitration, Argentina had relied upon an alleged estoppel which was created by a Chilean official military map, published in 1952, which clearly showed a boundary line very like the line claimed by Argentina and quite irreconcilable with the line then claimed by Chile.³⁹

In 1941, by a treaty concluded under Japanese mediation, Thailand recovered a good deal of formerly Thai territory in Cambodia in the area including the Temple. These retrocessions were annulled after the war, but some questions of boundary adjustment were referred to by a Franco-Siamese Conciliation Commission. These, however, did not include the Temple.⁴⁰

Looking at the incident as a whole, it appears to have amounted to a tacit recognition by Siam of the sovereignty of Cambodia (under the French Protectorate) over Preah Vihear. In his separate opinion, Vice-President Alfaro engaged in a valuable discussion of the principles underlying acquiescence, preclusion and estoppel. He said:

Silence by a state in the presence of facts contrary or prejudicial to rights later on claimed by it before an international tribunal can only be interpreted⁴¹ as tacit recognition given prior to the litigation.

39. XVI RIAA, p.109. See above, 4.3.5.

40. Thailand, on 12 May 1947, even filed with the Franco-Siamese Conciliation Commission a map showing Preah Vihear as lying in Cambodia. ICJ Reports, 1962, p.28.

41. Ibid., p.40.

Considering the fact that the acceptance of the Annex 1 map by the parties caused the map to enter the treaty settlement and to become an integral part of it, the Court subsequently decided to hold to the boundary line on the 1907 map rather than to endeavour to demarcate according to the watershed line in Article 1 of the Franco-Siamese Treaty of 1904 and held, by nine votes to three, that the Temple of Preah Vihear was situated in territory under the sovereignty of Cambodia.⁴²

In his dissenting opinion Sir Percy Spender pointed out that a mere adoption or acquiescence in Annex 1 by Thailand did not suffice to establish the Cambodian claim; another element appeared to be necessary:

The crucial question is ... whether the conduct of France and Siam ever gave rise to an implied conventional arrangements between the two states under which they mutually agreed to be bound by the frontier line shown on Annex 1 ... This⁴³ question, in my opinion, the Court leaves unanswered.

This, he conceded that acquiescence could provide an essential element in the establishment of a legal right, but it could not be a unilateral act.

3.3 Argentine-Chile Frontier Case⁴⁴

In this case, Chile relied upon a diplomatic correspondence between the parties in the years 1913-14 in which Argentina, in seeking only to raise a query about the correctness of the 1903 demarcation of Boundary Post 16, could be thought to be admitting

42. Ibid., p.33.

43. Dissenting opinion of Sir Percy Spender, ibid., p.130.

44. XVI RIAA, p.115, at pp. 164-66. See above, Ch. 3.

that the Rio Encuentro was the stream having its source in the mountains eastwards of the disputed area, viz., admitting the essence of what was then the Chilean case. This, said Chile, constituted an 'estoppel' and it was then, accordingly, too late to resile from that position. Argentina, however, countered by relying upon an alleged estoppel created by a Chilean official military map published in 1952, which marked clearly a boundary line very like the Argentine claimed line, and quite irreconcilable with the line then claimed by Chile. It appears that each party used its estoppel arguments as counters to the other's estoppel arguments, in the expectation that the case would be decided on the basis of estoppel. Estoppel indeed, played a particularly prominent part in the proceedings. The Court was appreciative that both the 1913-14 letters and the 1952 map were cogent evidence, even if not the basis for estoppel. In this connection the Court held that no claim of estoppel was made out by either Party against the other, and that therefore both parties were free without estoppel of any kind to put forward their respective contentions as to the course of boundary.

3.4 Rann of Kutch Arbitration (India v. Pakistan)⁴⁵

Recognition and acquiescence were, in the circumstances of the case, matters of evidence rather than exclusively matters of international law. India and Pakistan differed on the applicability of international law to the relations between

45. [1968] 50 ILR (1976), p.2. See above, Ch. 2.

the Paramount Power (British India) and its vassals, such as Kutch. While Pakistan contended that the relations between the Paramount Power and the native states were not governed by international law, and that if international law was ever applied it was only 'a matter of grace and concession' by the Paramount Power, India refuted these contentions. The question was, however, particularly important because after the British conquest of Sind, the Paramount Power remained the neighbour of its own vassals, Kutch and the other states under its suzerainty. Judge Bebler was of the opinion that international law applied between Great Britain and its vassal Indian states, and that such principles of international law as acquiescence and recognition in general, and in boundary matters in particular, were applicable to the relationship between the suzerain and the vassals in India under British rule. The Chairman, Judge Lagergren explained the relationship in terms of the relation between Great Britain, as Paramount Power, and the Indian vassal states and went on to examine the evidence put before the Tribunal, including the evidence submitted by India about the acquiescence and recognition of the Kutch-Sind border by the British authorities and its impact on the alignment of the boundary.

3.5 North Sea Continental Shelf Cases (Federal Republic of Germany v. Denmark; Federal Republic of Germany v. The Netherlands)

In these cases, an attempt was made to imply in the conclusion of the treaties of 1964 and 1965, between the United Kingdom on the one side and the Netherlands and Denmark on the other. This seems to be an acquiescence in the application of equidistance rule. Considering that the negotiations which culminated in the above treaties and the annexed Protocol, constitute an indivisible whole, the Court concluded that the FRG had formally reserved its position:

In both ... cases the Government of the Federal Republic pointed out to all the Governments concerned that the question of the lateral delimitation of the continental shelf in the North Sea between the Federal Republic and the Kingdoms of Denmark and the Netherlands was still outstanding and could not be prejudiced by the agreements concluded between those two countries and the United Kingdom.⁴⁶

In a separate opinion, Judge Ammoun observed:

Acquiescence flowing from a unilateral legal act, or inferred from the conduct or attitude of the person to whom it is to be opposed - either by application of the concept of estoppel by conduct of Anglo-American equity, or by virtue of the principle of ... allegans contraria non audiendus est⁴⁷ ... is numbered among the general principles of law accepted by international law as forming part of the law of nations, and obeying the rules of interpretation relating thereto. Thus when the acquiescence alleged is tacit, as it would be in the present case inasmuch as it is inferred from the conduct of the party against whom it is relied on, it demands that the intention be ascertained by the manifestation⁴⁸ of a definite expression of will, free of ambiguity.

46. ICJ Reports, 1969, p.19, para. 12. See below, Ch. 5, 7.

47. 4 Co. Inst. 279; Jenk., Cent. 19. He who makes statements which are mutually inconsistent is not to be listened to.

48. ICJ Reports, 1962, pp. 120-121, para. 22 [*italics supplied*].

Judge Padilla Nervo in his separate opinion said that the principle of estoppel could not be applied against the FRG. It could not be proved that Denmark and the Netherlands changed their position for the worse relying on such acts of the Federal Republic as its Proclamation or its manifestation of its intention to ratify the 1958 Convention on the Continental Shelf.⁴⁹

As to whether or not a situation of estoppel existed Judge Tanaka expressed, in his dissenting opinion, the view that 'there is no evidence that Denmark and the Netherlands were caused to change position or suffer some prejudice in reliance on the conduct of the Federal Republic, as is properly stated by the Court's judgment.'⁵⁰

3.6 The Beagle Channel Arbitration (Chile-Argentina)⁵¹

In the case, as has already been seen, Chile maintained that its acts of jurisdiction in relation to three small islands in the Channel, commencing in 1892 and encompassing the encouragement of colonisation, the establishment of a land lease system and the provision of various postal and other public services as well as the general exercise of civil and criminal jurisdiction, confirmed that the Chilean interpretation of the 1881 Treaty was the correct one. This was reinforced by the fact that Argentina was aware of such activities and did not issue any protest until 1915. In this context,

49. Ibid., p.96.

50. Ibid., pp. 173-74.

51. Beagle Channel Award, pp. 100-106, paras. 164-75.
See above, Ch. 3.

Argentina's 'continued failure to react to acts openly performed, ostensibly by virtue of the treaty, tend to give some support to that interpretation of it which alone could justify such acts'.⁵² In other words, the actions taken by Chile between 1892 and 1915 were deemed to be in pursuance of its understanding of the treaty.

Argentinian silence in that period underlined its acquiescence in that interpretation. A situation had been created which required a reaction on the part of Argentina in the area in question. The Argentine failure to protest for 34 years after the conclusion of the treaty, amounted to an adoption or recognition of the allocation effected by its provisions.⁵³ The tribunal did not consider it necessary to enter into a detailed discussion of the probative value of acts of jurisdiction in general. Nevertheless, it did indicate the reasons for holding that the Chilean acts of jurisdiction, while in no sense a source of independent right, called for express protest on the part of Argentina in order to avoid a consolidation of title; whilst these acts did not create any situation to which the doctrines of estoppel or preclusion would apply, they tended to confirm the correctness of the Chilean interpretation of the Island clause of the Treaty.⁵⁴

52. Ibid., pp. 105-6, para. 172 [*italics supplied*].

53. Oral Proceedings, VR/7, p.23; see also Award, p.102, para. 167.

54. Beagle Channel Award, p.101, para. 165.

To conclude, it is worth remembering that prescription is defined as a claim to peaceful, continuous and undisturbed exercise of territorial sovereignty during a period which is long enough to create, under the influence of historical developments, the general conviction that the present condition of things is in conformity with international order. The rational basis of prescription rests on consideration of quieta non movere,⁵⁵ but no general rule has been laid down regarding the length of time and other requirements for creating a legitimate title. Much depends on the undisturbed possession and the absence of repeated protests and claims by other states.

Moreover, it is clear that without any specified limits, prescription is of little value; whilst no time limit has actually been agreed upon, long continuance of possession gives support to territorial claims. Acquiescence and recognition are assumed with the passage of time: a form of 'estoppel'. It is pertinent to add that there is in international law a principle of estoppel which is a principle of substantive law and not just a technical rule of evidence.

55. See above, Ch. 2.

4. Abandonment or Derelictio

'A thing which is thrown away', Grotius writes, 'is understood by the act to be abandoned'.⁵⁶ Abandonment is defined as a voluntary relinquishment of a known right with no intention to reclaim.⁵⁷ By abandonment, rights of property and control become extinct. A state, as an incident of losing possession, animo et facto and sine spe redeundi, gives up these rights of property and control, and no immediate successor is at hand to keep them alive. In such a case, the territory becomes res nullius and is thereupon open to occupation by any other state.⁵⁸ Indeed, de Wolff adhered to the customary view that:

a thing is abandoned, if only the owner (maitre) does not wish it to be his any longer ... Whence it would seem that he who abandons a thing ceases to be the owner of it, and that, by consequence, the thing abandoned becomes a thing which belongs to no one; but so long as the owner has no intention to abandon his property, he remains the owner of it.⁵⁹

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56. Hugo Grotius, De Jure Belli ac Pacis, Vol. II, English trans. by Francis W. Kelsey (Oxford: Clarendon Press, 1925), Bk. I, ii, Ch. IV, S. IV, pp. 221-22.
57. Menzel v. Liszt, 49 Misc. 2d. 300; 267 N.Y.S. 2d 804 (Sup. Ct. 1966). In the North Atlantic Coast Fisheries Arbitration, the Arbitral Tribunal said that 'though a state cannot grant rights on the High Seas, it certainly can abandon the exercise of its right to fish on the High Seas within certain definite limits. Such an abandonment was made with respect to their fishing rights in the waters in question by France and Spain in 1763', XI RIAA, p.167, at p.195.
58. See generally, Charles Cheney Hyde, International Law Chiefly as Interpreted and Applied by the United States Vol. I (Boston: Little, Brown, 1922), p.197; L. Oppenheim, International Law, op. cit., pp. 579-91.
59. Christian Wolff, Institutions du Droit de la Nature et des Gens (Le ide, Chez Elie Luzac, MDCCLXXII), p.82, para. CCIII; T. Twiss, The Oregon Question Examined (London: Longman, Brown, Green and Longmans, 1846), p.166; J.B. Moore, International Law Digest, Vol. I, p. 298.

This point of view was also shared by Cobbett:

If territory once occupied is abandoned, it will again become open to occupation by other states. At the same time, if there has once been a definitive appropriation, the title accruing therefrom will not only be capable of being kept alive by an exercise of authority, less effectual than that required to establish an original claim; but even if there should be a temporary withdrawal, or even if the exercise of all authority should be temporarily relinquished, the territory will be deemed to be opened to resumption or recovery within a reasonable time, having regard to the circumstances of the withdrawal.⁶⁰

It may be taken, just as wild bird or wild animal is taken, by seizing it with the intention to keep it; but it is expressly laid down that a wild animal, if it escapes, ceases to be the property of the captor; and the question is, therefore: is the captured property so reduced to possession as to make it altogether the property of the captor?⁶¹ There was much dispute on this point among the interpreters of Roman law. Some, including Grotius, maintained that the proper test was time. In his De Jure Belli ac Pacis, Grotius observed:

60. Pitt Cobbett, Leading Cases on International Law, 4th ed., Edited by Hugh H.L. Bellot, Vol. I (London: Sweet & Maxwell, 1922), pp. 111-12. Cf. Grotius, op. cit., Bk. I. ii. Ch. IV. S. IV. pp. 221-22: '... unless the circumstances of the case are such that we ought to think it was thrown aside [abandoned] for the moment and with the intention of recovering it later'.

61. Cf. Henry Sumner Maine, International Law (London: John Murray, 1888), p.95. In Roman law the acquisition of an object abandoned by its owner is construed, not as derelictio cum occupatio, but as traditio incertae personae. See David Daude, 'Derelictio, Occupatio and Traditio: Romans and Rabbis', 77 ILQ (1961), p.382.

Because a length of time exceeding the memory of man is in its essential character practically infinite, a silence for that length of time will always seem sufficient to imply abandonment of ownership,⁶² unless there are very strong reasons to the contrary.

Lapse of time, combined with the facts, may amount to abandonment of a title, either before or after presentation.⁶³ The effect of the lapse of time upon the property or right of a state relative to another is the real subject for consideration. If this is borne in mind, two consequences can be seen to follow: first, that it would be contradictory to deny that prescription can function as a mode of acquisition; and second, that it is both inexpedient and impracticable to attempt to define a precise period of time within which title of national possession can be said to have become established.⁶⁴

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62. De Jure Belli ac Pacis, op. cit., Bk. I. ii. Ch. IV. S. VIII. p.224 [italics added]. As the Island of Palmas Arbitration indicates, the doctrine of inchoate title, though the uncertainty concerning a length of time for which the title lasts is a disadvantage, does, on the whole, make a useful contribution to international jurisprudence by forbidding unscrupulous attempts to jump the first occupant's claim before he has time to make his occupation effective. II RIAA, pp. 846, 868-69.
63. Cf. The Case of Sarropoulos v. Bulgarian State, the Greco-Bulgarian Mixed Arbitral Tribunal, 14 February 1927, 4 Annual Digest of Public International Law (1927-28), Case No. 173, p.263.
64. Vattel expresses a wish that such a period could be ascertained by means of treaties. See E. de Vattel, De Droit des Gens, Bk. II, Ch. XI, p.159, para. 151. Cf. Treaty of Washington between Great Britain and Venezuela on 2 February 1897: 'Adverse holding or prescription during a period of fifty years shall make a good title'; see 20 Hertslet's Commercial Treaties, p.943.

What duration or lapse of time, then, is required by the canons of international jurisprudence in order to constitute a lawful possession? First, the title to a territory in the actual possession of the state, however originally obtained, must be peaceful.⁶⁵ Secondly, a forcible and unjust seizure of a territory, with the inhabitants overpowered by the use of superior physical force, is a possession which, lacking an originally just title, requires the aid of time to cure its original defect;⁶⁶ if the nationals so subjugated succeed, before that cure has been effected, in shaking off the foreign yoke, the state is legally and morally entitled to resume its former position in the international community.

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65. This rule seems to mean that the first assertion of sovereignty must not be a usurpation of another's subsisting occupation nor contested from the first by competing acts of sovereignty. See, e.g. Island of Palmas Arbitration, II RIAA, p.830; the PCIJ held in the Eastern Greenland Case that mere protests from Norway did not alter the peaceful character of Denmark's display of state activity. PCIJ Ser. A/B, No. 53, p.62. However, Judge Levi Carnerio in his separate opinion of the Minquiers and Ecrehos Case took the view that a protest can preserve and keep alive the claim of the protesting Government, so that no inference of abandonment can be drawn from its silence, or of recognition of the other party's position. ICJ Reports, 1953, p.106. For details, see MacGibbon, op. cit., 30 BYIL (1953), p.293.
66. This seems to have done in the case of Israel, which in 1948 by Military force occupied territory beyond that which the United Nations Resolution of 1947 had assigned to it. The United Nations seems to have acquiesced not only in Israel's forcible acquisition of territory, but also in that country's refusal to accept the policy for the internationalisation of Jerusalem.

'Prescription', as has been acknowledged, is part of lex lata, and international tribunals have indeed applied the rules of prescription, on account of lapse of time, with regard both to acquisition of territorial title and to loss of the right to advance a claim.⁶⁷

In contrast, the title of 'prescription' in another state is often, though not necessarily, founded on the presumed abandonment of the possession by the original owner. To interpret the absence of state activity by one state where there has been adverse possession by another as a presumption of abandonment is merely to invoke 'prescription' under another name, though the inactivity of a state may serve to interpret the consequences of a specific act which might have been an abandonment, for instance the British withdrawal from the Falkland Islands in 1774.⁶⁸ Thus, it is difficult

67. It is interesting to note that in 1927 the Greco-Bulgarian Mixed Arbitral Tribunal, in the case of Sarropoulos v. Bulgarian State, affirmed that prescription being an integral part of every system of law must be admitted in international law and that 'it was the duty of an arbitral tribunal ... to consider the principles of international law in regard to prescription and to apply it in the specific case submitted to it'. 4 Annual Digest and Reports of Public International Law Cases (1927-28), Case No. 173, p.263. For further discussion, see King, 'Prescription of Claims in International Law', 15 BYIL (1934), pp. 88-89, 94-95.

68. Attempts have been made to retain possession without actual presence. So when, in 1774, Great Britain retired from the Falkland Islands, the Commander thought it well to leave behind a leaden plate as a mark of possession.

to base them upon a presumed abandonment⁶⁹ as de Vattel says:

... a long silence can with difficulty support a lawful presumption of abandonment. Consider ... that as the ruler of the society has not ordinarily the power to alienate what belongs to the state, silence on his part, even did it suffice to raise a presumption of abandonment as far as he is concerned, does not impair the rights of the nation or his successors. The question will then be whether the nation has failed on its part to assert the right which its ruler was silent about and has thus given its implied approval of his attitude.⁷⁰

Goebel, Jr., points out the importance of abandonment where the adverse possessor cannot show the bona fides necessary for 'prescription' as bona fides was not an essential element for 'occupation'.⁷¹ However, it has been argued that bona fides is not an essential factor in 'prescription' and therefore the significance of abandonment is thereby reduced.⁷² Yet it is relevant in so far as the differences between occupation and prescription are concerned, because if the land reverts to the status of terra nullius it may legally be occupied by any state without the need for prescription to run. Therefore, the distinction between occupation

69. De Wolff defines usucaption to be an acquisition of domain founded on a presumed desertion and caused by long silence. See Wolff, op. cit., p.201, para. MCXXXIX. Cf. Vattel, op. cit., Bk. II. Ch. XI, pp. 156-59. In Roman law, 'usucaptio indicated ownership acquired by enjoyment through long though undefined lapse of time'. Little, Commissioner, John H. Williams v. Venezuela (1885); Moore, International Arbitrations, IV, p.4181.

70. Le droit des gens, op. cit., Bk. II, Ch. XI, p.159, para. 148.

71. Julius Goebel, Jr., The Struggle for the Falkland Islands: A Study in Legal and Diplomatic History (New Haven: Yale U.P., 1927), pp. 422-23.

72. Alexander George Roche, The Minquiers and Ecrehos Case (Geneva: Librairie Droz, 1959), pp. 35-36.

and prescription may make a considerable difference as to the final result of the case.

Although cases of abandonment in recent times are extremely rare, history knows of several such cases. But, very often, when such occupation of abandoned territory has occurred, the former owner protests and tries to prevent the new occupier from acquiring it. The island of Santa Lucia and the Falkland Islands, referred to in the following sections, are the obvious examples. When an occupied territory is definitely abandoned, either voluntarily, or in consequence of expulsion by natives or by a state which does not attempt to set up a title for itself by conquest,⁷³ the right to its possession is lost, and it remains open to occupation by states other than that which originally occupied it. But when occupation has not only been duly effected, but has been maintained for some time, abandonment is not immediately supposed to be definitive. If it has been voluntary, the title of the occupant may be kept alive by acts, such as the assertion of claim by prescriptions, which would be insufficient to confirm that mere act of taking possession;

73. Traditional international law recognised 'conquest' as a mode of acquisition of territory. But in so far as contemporary international law is concerned, conquest can no longer be regarded as a legitimate mode of acquisition. See above, Ch. 1.

and even where the abandonment is complete, an intention to return must be presumed for a reasonable time. If it has been involuntary, the question of whether the absence of the possessors shall or shall not extinguish their title depends upon whether the circumstances attendant upon, and following, the withdrawal suggest the intention, or give grounds for reasonable hope, of returning. Where intention is relied upon in the case, it is evident that, as abandonment was caused by the superior strength of others who might interfere with the return, a stronger proof of effective intention must be afforded than on an occasion of voluntary abandonment, and that the effect of a mere claim, based upon the former possession, if valid at all, will soon cease.⁷⁴

4.1 Island of Santa Lucia⁷⁵

Santa Lucia, one of the Antilles Islands, was discovered by Columbus on his fourth voyage in 1502. In 1605 the first attempt at settlement was made by Englishmen, most of whom were killed by the Caribs. In 1638 there was another attempt at

74. W.E. Hall, A Treatise on International Law, 8th ed., edited by A. Pearce Higgins (Oxford: Clarendon Press, 1924), pp. 140-41. 'Abandonment should not be deemed to have taken place without ample proof of a design to give up all rights of property and control. Such a design might be established by evidence of long-continued and complete neglect of the territory, or of a formal and appropriate declaration of policy.' Hyde, op. cit., pp. 198-99.

75. James Lorimer, The Institute of the Law of Nations, Vol. II (Edinburgh and London: William Blackwood & Sons, 1884), pp. 584-85; Hall, op. cit., p. 140; Moore, International Law Digest, I, p.298.

settlement by English settlers who were overcome by the Caribs in 1640. France, considering the territory to be *terra nullius*, took possession of it in 1650 as unappropriated territory and made a treaty with the Caribs; but an English force under Lord Willoughby attacked the French, driving them into the mountains, and held the island until it was restored to the French by the Treaty of Breda on 21 July 1667.⁷⁶ When the English withdrew, the French came down from the mountains and effectively re-occupied the island. No further attempt was made by England to recapture the island, but nevertheless for many years she asserted that she had not abandoned it sine spe redeundi, and that therefore France in 1650 had no right to consider it terra nullius nor to treat the island as abandoned territory.⁷⁷ In February 1762 the island was re-captured by the English, but it was given back to France once more by the Peace Treaty of Paris of 1763.⁷⁸ Britain finally relinquished her claims to Santa Lucia in the Treaty of Versailles in 1783.⁷⁹ Considering the

76. Arts. 12, 13, Knapton, Gen. Coll. of Treaties, 2nd ed. I (London, 1732), p.127. Alternately in French and English hands till treaty of Aix-la-Chapelle, when it was declared neutral in 1748.

77. In Her Majesty's Attorney-General for British Honduras v. John Bristowe and Charles Thomas Hunter, Sir Montague E. Smith held that: 'In 1798 during the war which commenced in 1796, an attack was made by the Spanish forces on the English settlers in British Honduras, which was repulsed, and the Spaniards withdrew from the territory. There appears to be no trace of their having re-occupied it. Down to this time the sovereignty of the territory had ... remained in the Crown of Spain; but no future attempt was made by the Spanish Crown to restore its authority, and its dominion seems to have been tacitly abandoned'. 2 BILC p.403, at p.406. Cf. R.A. Humphreys, The Diplomatic History of British Honduras 1638-1901 (Oxford U.P., 1916), pp. 1-19.

78. Article 9. Martens, Rec. de Tr., I (1817), pp. 104-112.

79. Article 7. Martens, Rec. de Tr., III (1818), p.519.

shortness of the period of English occupation of the island, and the length of the period during which the English made no attempt to re-establish occupation, there can be little doubt that the French were justified in supposing the English to have abandoned the island and that the occupation would be good in law.⁸⁰

4.2 Bay Islands⁸¹

This group of small islands lies in the Gulf of Honduras off the north coast of Honduras. It includes Roatan or Coxin's Hole, which is the largest; Guanaja or Bonaca, the next in size; and the smaller Barbareta, Elena, Morat, Puercos and Utila islands. In the seventeenth century the islands were occupied by the British who, in 1742, erected first on Roatan and settled on Guanaja as well as Utila. On 19 May 1744 Philip V of Spain ordered the governor of Honduras to destroy the settlements. There were allegations of subsequent abandonment by Great Britain, but in 1835 and again in 1841

80. Hall, op. cit., p.140; Cf. Island of Palmas Arbitration II RIAA, pp. 838-39. By the Treaty of Amiens in 1802 St. Lucia was yet again returned to France but it was captured by Britain in 1803 and has remained under British rule since then. By the Treaty of Paris in 1814 it was excepted from territories restored to the French by whom it was formally ceded. St. Lucia finally ended up as a British colony. For a brief history see Sir Kenneth Roberts-Wray Commonwealth and Colonial Law (London: Stevens & Sons, 1966), p.857. Now independent state after brief period of status as an associated state under the West Indies Act of 1967 (UK).

81. On 17 July 1852 the British Colonial Secretary issued a proclamation that 'Her Most Gracious Majesty the Queen has been pleased to constitute and make the islands of Roatan [Ruatan], Bonacea, Utila, Barbarat, Helene and Mozat to be a colony to be known and designated as 'the Colony of the Bays Islands'. See Moore, International Law Digest, III, pp. 140-145. Cf. Gordon Ireland, Boundaries, Possessions, and Conflicts in Central and North America and the Caribbean (Harvard U.P., 1941), p.316.

the British landed on Roatan, hauled down the Honduran flag, and raised that of Great Britain. On 20 March 1852 Lord Aberdeen declared the Bay Islands to be a British Colony under the Governor of Jamaica.⁸² The United States, however, under the Clayton-Bulwer Treaty of 1850, urged Britain to abandon the Bay Islands Colony and to return all the islands to the sovereignty of Honduras.⁸³ Finally, a treaty was signed on 28 November 1859 and Great Britain voluntarily abandoned the islands.⁸⁴

4.3 Falkland Islands⁸⁵

In 1820 a claim to the Falkland Islands (Isles Malvinas)⁸⁶

82. 41 BFSP 156; Parl. Papers, 1856 (15 & 16 Vict.), H.C. XLIV No. 141, pp. 1-5; ibid., LX, No. 2052, p.223; Martens, Rec. de Tr., XV (1857), p.204.

83. 42 BFSP 186; 47 ibid., 661-667; 50 ibid., 143-328. Moore, International Law Digest, III, pp. 140-45, 163, 166, 169, 181.

84. 49 BFSP 13; Martens, Rec. de Tr. XVI (1860). II, 370. De Wolff says that 'occupation ... gets a new value from abandonment, so that the occupation, which was before illegal, when there is an abandonment by consent of the owner, now begets a right, by force of the tacit consent of the owner'. See Christian de Wolff, Jus Gentium Methodo Scientifica Pertractatum, Vol. II, English trans. by Joseph H. Drake (Oxford: Clarendon Press, 1934), pp. 49-50, para. 84.

85. Report by Herbert Jenner to the Earl of Aberdeen with regard to the Falkland Islands on 28 July 1829, F.O. 83. 2227: Argentina. See Lord McNair, International Law Opinions, Vol. I (Cambridge U.P., 1956), pp. 229-301; 20 BFSP, pp. 314-15; 338-55; 1197-99; 22 BFSP, p.1394; 23 BFSP, p.193; 31 BFSP, p.1004; Moore, International Law Digest, I, p.876; C.H.M. Waldock, 'Disputed Sovereignty in the Falkland Islands Dependencies', 25 BYIL (1948), p.311; Robert-Wray, op. cit., p.865; David Cross, 'History of Sovereignty Claims', The Times, 15 April 1982, p.7.

86. In a debate in the Fourth Committee of the General Assembly on a draft resolution concerning the Falkland Islands (UN Doc. A/C.4/L.802) the U.K. representative, Mr. Brown, requested/

was made by the United Provinces of Rio de la Plate, (later the Argentine Republic) as successors to the rights of Spain. These islands, though not then newly discovered, were first claimed on behalf of his country by the French explorer Louis Antoine de Bougainville in the year 1764.⁸⁷ In the following year Commodore John Byron took formal possession of the Islands in the name of His Britannic Majesty and formed a settlement in West Falkland at Port Egmont, on the small island called 'Saunders'.

About 1765, de Bougainville, acting in a private capacity, formed a settlement in East Falkland, which he called 'Port Louis'. In 1766, at the protest of Spain, France relinquished this settlement and ceded the islands to Spain, which later abandoned the islands in 1806. De Bougainville was compensated for his expenses and a Spanish force took possession of the

requested that the Spanish term 'islas Malvinas' in the text should be translated into English as 'Falkland Islands'. It should be understood that the terms used could have no implication so far as the question of United Kingdom sovereignty over the islands was concerned. UN Gen. Ass., 20th Sess. 4th Committee, 1556th Meeting, Provisional Summary Record, A/C.4/SR, 1556, p.5.

87. It is stated by the British that the Falkland Islands were first discovered by an Englishman Captain John Davis in 1592. Goebel, Jr., however, maintains that the first discovery of the islands is uncertain. Goebel, Jr., op. cit., Ch. 1.

Port, changing its name to Puerto de la Soledad.⁸⁸ It did not appear that the English or Spanish settlements knew of each other till 1769, when an English vessel, cruising off the island, met a Spanish vessel belonging to Soledad. The Commanders of the British and Spanish settlements thereupon laid claim to the exclusive sovereignty of the islands on behalf of their respective Crowns, and warned the other party to leave the coast. On 4 June 1770, a Spanish force attacked and took by force the British settlement.⁸⁹ After serious discussions which ensued between the two Courts, the Spanish Ambassador, Prince de Masserano, disavowed the act of violence and agreed in 1771 to restore the settlement and Port Egmont to the British, the state in which it existed before the attack; but concluded his note with a declaration that 'this restoration cannot, nor ought it to, in any way affect the question of the prior Sovereignty of ... the Falkland Islands'.⁹⁰

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88. Great Britain contended that France by her retirement had confessed her lack of title and hence could transfer no rights to Spain. 'If', as the U.S. Charge d'Affaires at Buenos Aires expressed it in a note of 10 July 1832, 'the doctrine assumed by Spain was correct, that France had not even a colourable title, the cession was a nullity;= and it is a fact that Spain so regarded it, and relied on her prior rights alone, in her subsequent controversy with Great Britain'. 20 BFSP, p.345.
89. Argentina was at that time still one of the dominions of the Kingdom of Spain. Buccarelli, the Governor of Buenos Aires, without instructions sent a task force of five Spanish frigates to seize the Falklands. Philip Howard, 'The First Missile to Hit the Falklands', The Times, 2 June 1982, p.10.
90. Cf. Report by Herbert Jenner on 28 July 1829, F.O. 83. 2227: Argentina. See McNair, op. cit., Vol. I, pp. 299-300.

In 1774, in pursuance of economic reductions in the Naval Department, the British left the islands⁹¹ but Lieutenant Clayton, commanding Port Egmont, had a lead plaque engraved and attached to the fort, in order to preserve the rights of the Crown of Great Britain; it read as follows:

Let it be known to all nations that the Falkland Islands, as well as this Fort, the Magasins, Quays, Havens, Bays and Creeks, thereof, belong by right only to His Most Sacred Majesty George III, King of Great Britain, France and Ireland, Defender of the Faith, C. In witness whereof this Plaque has been fixed and the flags of His Britannic Majesty deployed (unfurled) and hoisted, as a mark of possession, by Samuel William Clayton, Officer commanding the Falkland Islands, 22nd May, 1774.⁹²

It was argued on behalf of Argentina that the withdrawing of the British troops in 1774 amounted to a virtual abandonment of the right originally acquired, and that the islands in question reverted to their original state, and were thus terra nullius and open for occupation. In a note of 19 November 1829, the British Government stated that:

91. IThe withdrawal of His Majesty's force from these islands, in the year 1774, cannot be considered as invalidating His Majesty's just rights ... when the Governor took his departure, the British flag remained flying, and all those formalities were observed which, indicated the rights of ownership, as well as an intention to resume the occupation of the territory, at a more convenient reason'. A Note was instructed by Woodbine Parish, the British Charge d'Affaires, on 19th November 1829 to the Argentine Republic. 20 BFSP, pp. 346.

92. Martens, Rec. de Tr., III (1818), p.252; see also Wyndham A. Bewes, 'The Monroe Doctrine and Entangling Alliances', 13 Transactions of the Grotius Society (1927), p.16.

The withdrawal of His Majesty's forces from these islands, in the year 1774, cannot be considered as invalidating His Majesty's just rights. That measure took place in pursuance of a system of retrenchment, but the marks and signals of possession and property were left upon the islands: when the governor took his departure, the British flag remained flying, and all those formalities were observed which indicated the rights of ownership, as well as an intention to resume the occupation⁹³ of the territory, at a more convenient season.

Moreover, Herbert Jenner, a member of Doctors' Commons⁹⁴ was of the opinion that:

The Symbols of property and possession which were left upon the Islands sufficiently denoted the intention of the British Government to retain those rights which they had previously acquired over them, and to reassume the occupation of them when a convenient opportunity should occur ... the rights acquired by this Country [Great Britain] to the Falkland Islands [are] not invalidated by any thing that has occurred previous or subsequent to the year 1774.⁹⁵

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93. A note of diplomatic protest from Woodbine Parish, the British Charge d'Affaires at Buenos Aires, to the Government of Buenos Aires. 20 BFSP, pp. 346-47.
 94. In the sixteenth century it became common for the Crown when confronted with a question of international law to seek the 'Opinion of the Doctors' - the opinion of the group of civil lawyers who were members of the college located near St. Paul's Cathedral known as Doctors' Commons. See A.D. McNair, 'The Debt of International Law in Britain to the Civil Law and the Civilians', 39 Transactions of the Grotius Society (1953), p.183; G.D. Squibb, Doctors' Commons: A History of the College of Advocates and Doctors of Law (Oxford: Clarendon Press, 1977); For H. Jenner see Appendix III, p.201.
 95. F.O. 83. 2227: Argentina. On 20 December 1832, possession was formally resumed on behalf of Great Britain. See McNair, op. cit., pp. 300-1. Cf. 2b BDIL, p.613; the U.K.'s Application filed with the ICJ on 4 May 1955: UN Monthly Chronicle (December 1965), pp. 83-84. A corollary to Argentina's claim to have succeeded to Spanish rights in the Falklands is her appeal to the principle of uti possidetis. Metford, however, argued that uti possidetis was not formally adopted until the Congress of Lima in 1848, by which time the Falklands had again been under British control for a number of years. See C.J. Metford, 'Falklands or Malvinas?' 44 International Affairs (1968), p.463, at pp. 472-73.

It will be noted that abandonment is a question to be decided, inter alia, by intention and that the simple leaving of a possession without the intention of definitely abandoning it, is not sufficient.⁹⁶ This view was also expressed by the League of Nations in 1924 - when they examined the Mosul frontier, between Turkey and Iraq⁹⁷ - to the effect that a district, the actual possession of which has been lost by a state, remains in international law an integral part of the territory of that state and is subject to that state's legal sovereignty until that state renounces its rights. However, an intention to abandon may be spelled out from the circumstances of the supposed withdrawal of state authority. In Judge Huber's view, which was formulated in the Island of Palmas Arbitration, the 'continuous and peaceful display of territorial sovereignty' is a way of acquiring title to territory, and conversely, failure to 'display state activities' or failure to protest against competing acts of sovereignty, openly performed, would suffice to indicate that the requisite degree of state activities in maintaining the title was not being shown.⁹⁸ As has been

 96. Cf. The Clipperton Islands Arbitration, II RIAA, p.1108; Legal Status of Eastern Greenland Case, PCIJ Ser. A/B, No. 53, p.22. See above, Ch. 3.

97. Frontier between Turkey and Iraq (Advisory Opinion) Case [1925] PCIJ Ser. B, No. 12; Ser. E, No. 2, p.140. See above, Ch. 2.

98. II RIAA, pp. 838-39. Cf. I.C. MacGibbon, 'The Scope of Acquiescence in International Law', 31 BYIL (1954), p.143, at p.168. See above, Ch. 3.

mentioned, the Argentine claim is based, inter alia, on a possession uncontested and uninterrupted for fifty-nine years (1774-1833). It is recognised that where there has been no reaction to adverse assertions of sovereignty which were (or ought to have been) known to the original owner, such failure to protest (in circumstances in which both judicial authority and practice of states afford ample indication of the necessity for protest to preserve the right in question) ought to bear the necessary implication of an intention to abandon the right.⁹⁹

After maintaining the settlement at Soledad, on East Falkland, for forty years, the Spanish Governor Martinez also abandoned it in June 1806 on hearing that Buenos Aires was in the hands of the British. Both the East and West Falkland Islands were therefore without permanent occupation for some years.

99. Conversely, von Martens observed that 'abstaining from the use of a right, or keeping silence while another makes use of it, can never have the force of consent, except we are obliged to speak of, or make use of, a right; ... As long as there is no engagement, simple presumption, founded on our silence or inaction, cannot deprive us, in spite of ourselves, of our rights for the time to come. Prescription does not, then, constitute a natural right; ... if it be presumed that they have consented to it; still we are so far from the object as ever, as long as the time required for losing or acquiring by prescription remains undetermined, and as long as the universal law of nations cannot determine it with precision'. G.F. von Martens, The Law of Nations, trans. from the French by W. Cobbett, 4th ed. (London: William Cobbett, 1829), pp. 64-65.

In 1810 a revolution broke out in the Spanish Vice-royalty of Rio de la Plata which resulted in its complete severance from Spain.¹⁰⁰ Ultimately, the Spanish territories in Latin America became the seat of several independent states, successors to the Spanish sovereignty, among them the Argentine Republic.

On 9 July 1816, the United Provinces of the Rio de la Plata declared their independence from Spain. They claimed to succeed Madrid in sovereignty over the Falklands. On 6 November 1820, the United Provinces took possession of Soledad, on the arrival of their representative, Colonel Daniel Jewett, in the name of 'the Supreme Government of the United Provinces of South America'.

In 1826, with the approval of the Buenos Aires Government, Lewis Vernet (a German who had long resided in Latin America and was later appointed governor of the islands) initiated the revival of the Port Louis settlement.¹⁰¹

100. Principal events leading to the occupation of the Falkland Islands by Britain were the revolt of Argentina, a Vice-royalty, against Spanish rule, beginning in 1810 and bringing the province to virtual independence over the next decade. J.E.S. Fawcett, 'The Falklands and the Law', The World Today (June 1982), p.204; On 1 November 1836 Capt. George Grey wrote: 'Either in 1811 or 1812, the Provinces of the River Plate having declared their independence, the Spanish garrison was withdrawn and for a number of years there appeared to have been no inhabitants at all and no nation claiming authority'. G. Grey, 'Letter from CLEOPATRA at Sea', (1836 Manuscripts; rpt.) in The Observer Review, 2 May 1982, p.25.

101. 26 BDIL (1967), p.46.

On 10 June, 1829, the Government of Buenos Aires issued a decree asserting sovereignty over the Falkland Islands.¹⁰²

British protests followed; a note of 19 November 1829 stated that:

These rights, founded upon the original discovery and subsequent occupation of the said islands, acquired an additional sanction from the restoration, by His Catholic Majesty, of the British settlement, in the year 1771, which, in the preceding year, had been attacked and occupied by a Spanish force, and which act of violence had led to much angry discussion between the Governments of the two countries ... The undersigned, therefore ... formally protests, in the name of His Britannic Majesty, against the pretensions set up by the Government of Buenos Ayres, in their decree of the 10th of June, and against all acts which have been, or may thereafter be done, to the prejudice of the just rights of sovereignty which heretofore have been exercised by the Crown of Great Britain.¹⁰³

In his note of 8 January 1834, Lord Palmerston, the British Foreign Secretary, declared that

the Government of the United Provinces could not reasonably have anticipated that the British Government would permit any other state to exercise a right, as derived from Spain, which Great Britain had denied to Spain herself.¹⁰⁴

102. 'When by the glorious revolution of the 25th May, 1810, these provinces separated themselves from the dominion of the Mother Country, Spain held the important possession of the Islands of Malvinas (Falkland Islands)... this possession was justified by the right of being the first occupant, by the consent of the principal maritime Powers of Europe, and by the proximity of these islands to the continent which formed the Vice-royalty of Buenos Aires, unto which government they depended. For this reason, the Government of the Republic, having succeeded to every right which the mother country previously exercised over these provinces, and which its Viceroy possessed, continued to exercise acts of dominion in the said islands, its ports, and coasts, notwithstanding circumstances have hitherto prevented this Republic from playing the attention to that part of the territory which ... it demands ...' 20 BFSP, pp. 314-15.

103. Ibid., pp. 346-47.

104. 22 BFSP, p. 1386.

In 1832 Great Britain reasserted its sovereignty by sending out a naval expedition. The United Provinces' Commander was ordered to quit; he acquiesced. In January 1833, the British landed and replaced the United Provinces' flag with the British flag.¹⁰⁵ After the British had again taken possession, the Argentine Minister, while demanding the restoration of the Islands as having been Spanish, and so passed on to the Argentine Confederation as a result of its assertion of independence, asked for the restoration of East Falkland 'which never was English'.¹⁰⁶

If the Argentines are right in asserting that they were forcibly removed from the islands and that they have been debarred ever since, and that they have taken all reasonable and practical steps, such as protestations¹⁰⁷ to keep their claim alive, then clearly they have a case in law which requires to be answered.

105. 20 BFSP, pp. 1196-97.

106. It may be construed as a distinct implication of the British right to West Falkland which were unreservedly handed over to the British when Spain abandoned its possession of the islands in 1771, and the first assertion of a claim on behalf of the Buenos Ayres Government was made in 1820 by a native of Pennsylvania. Subsequently, the United States supported the claim of the British Government.

107. In certain circumstances, a protest can preserve and keep alive the claim of the protesting state, so that no inference of abandonment can be drawn from its silence, or of recognition of the other state's position. Cf. Judge Carneiro's separate opinion, the Minquiers and Ecrehos Case, ICJ Reports, 1953, p.106. The Argentinian protests could be used as a means of preventing the maturing of the British prescriptive title. For details, see E. Bruel 'La protestation en droit international', 3 Nordisk Tidsskrift for International Ret (1932), p.76; MacGibbon, op. cit., 30 BYIL (1953), pp. 293-319.

The British claim is based on discovery, settlement, use and continuous occupation by its citizens for the last one hundred and forty-nine years (1833-1982).¹⁰⁸ The Argentine claim is, however, based on: (a) the acquisition by treaty of all Spanish rights; (b) possession begun and exercised; (c) recognition, tacit and explicit, by other states; (d) prescription, 'resulting from a possession uncontested and uninterrupted for fifty-nine consecutive years' (1774-1833).¹⁰⁹ It thus asserted that - from the aspect of the acquisition of a prescriptive right following an originally 'illicit seizure' - the British claim was illegal ab initio.

108. The British claim is based on (i) prior discovery; (ii) formal possession by Commodore Byron in 1765; (iii) actual occupation in 1766; (iv) the disavowal by Spain, in 1771, of the dispossession of the British colony the year before and the subsequent restoration to Great Britain without any secret understanding that Britain was pledged to restore the islands to Spain at a subsequent date; (v) the formalities observed on the evacuation in 1774, 'calculated not only to assert the rights of ownership, but to indicate the intention of resuming the occupation of the territory at some future period'. See Ellery C. Stowell and Henry F. Munro, International Cases, Vol. 1 (Cambridge, Massachusetts: The Riverside Press, 1916), p.215. For details of the British title asserted, see 2 a BDIL, Ch. 5 above.

109. Calvo, op. cit., pp. 417-25, para. 287. 'Accordingly', says Calvo, 'the Argentine Republic maintains and will maintain over the islands in question, as long as the usurpation of its sovereign domain by the British Government continues, the absolute right of ownership which Argentina holds impliedly from Spain ... and the exercise of which would never have been interrupted save for the abuse of force on the part of Great Britain'. See Stowell and Munro, op. cit., pp. 216-17.

It should be noted that the non-recognition of territorial gains resulting from an 'unlawful' use of force has its origins in the League of Nations Resolution of 1932¹¹⁰ and in similar declarations, made for the most part by groups of American states, during the inter-war period.¹¹¹ When, in the first half of the nineteenth century, the Falkland Islands were seized from Argentina, conquest was not forbidden¹¹² under inter-temporal law. It is therefore submitted that the principle ex injuria jus non oritur seems to have been rendered valid only in contemporary international law.

110. Resolution of the Assembly of the League of Nations, 11 March 1932. See 26 AJIL (1932), p.343. It is often maintained that the Covenant of the League of Nations changed the foundations of law in respect of the place of war in international law. The Covenant not only created express obligation to use peaceful means to settle disputes, but also provided the means of limiting the use of force by sovereign states.

111. In the Chaco Dispute between Bolivia and Paraguay, the other nineteen American Republics declared on 3 August 1932 that they will not recognise any territorial arrangement of this controversy which has not been obtained by peaceful means nor the validity of territorial acquisitions which may be obtained through occupation or conquest by force of arms. For details, see W.R. Garner, The Chaco Dispute (Washington D.C.: Public Affairs Press, 1966).

112. Khan has recently stated that prescription was not universally recognised at the time of the British repossession of the Falklands in 1833; this, however, is not the case in relation to conquest which was a legal basis of title until the early twentieth century. Kabir-ur-Rahman Khan, 'Letters to the Editor', The Scotsman, 1 June 1982, p.8. Professor Fawcett says that the taking of the Falkland Islands by force in 1833 was not contrary to the law applicable at that time. Fawcett, op. cit., The World Today (June 1982), p.204. Cf. Khan, 'The Falkland Islands Conflict: Images and Reality of International Law' The Old College Times, No. 6 (Summer Ed. 1982), p.11. Cf. Gaston Jeze, Etude Theorique et Pratique sur L'Occupation Comme mode d'acquérir les Territoires en Droit International, (Paris: V. Giard & E. Briere, 1896), Livre III, pp. 59 et seq.

Having re-occupied the Falkland Islands by force in 1833, the United Kingdom claims that 'by open continuous and peaceful occupation for over a century and a half it has acquired a clear prescriptive title'.¹¹³ Khan suggests that this contention relies on three essential assumptions. First, that prescription, at the time of the forceful occupation, was not a universally recognised rule of international law. The second assumption, according to Khan, is that consent of the vanquished is either unnecessary or is simply assumed to be given by virtue of occupation. Khan argues that neither assumption is valid since Travers Twiss denies automatic operation of prescription, and notes that it is not the superior power of the conqueror which gives right to his conquest, but the consent of the conquered which ultimately sanctions the conqueror's right.

Khan then summarises the Argentine claims based, inter alia, on prescription. Thirdly, Khan alleges the UK is contending that legal rules remain static and should be examined in an insulated manner impervious to any changing norms and international standards, whereas most of the world does not seem to share this 'sophistry'.¹¹⁴

113. UN Doc. A/5800/Rev. 1 (1965).

114. Khan, op. cit., The Scotsman, 1 June 1982, p.8.

In view of the historical facts there are, however, at least four points to be made concerning the above point of view. First, the British claim, as has already been shown, is not solely based on prescription, but also on discovery, use, settlement, conquest and effective occupation. Secondly, Khan seems to have contradicted himself: he states that the British claim is based on prescription, which he says was not part of general international law in the first half of the eighteenth century; he then says prescription is one of the bases for the Argentine claim. Thirdly, Khan seems to believe that all Spanish rights include the sovereignty of all the Falkland Islands. He does not, however, note that, following the continuous settlement at Puerto de la Soledad for forty years, the Spanish Governor Martinez abandoned the islands in June 1806. Fourthly, Khan seems to acknowledge, at first, the validity of inter-temporal law, which was recognised by international tribunals in the Island of Palmas, Eastern Greenland and Minquiers and Ecrehos Cases; later, he states that:

Most of the world does not seem to share this sophistry ... that legal rules remain static and should be examined in an insulated manner impervious to any changing norms and international standards.¹¹⁵

It seems Khan confused 'inter-temporal law' with the 'transformation of international law'. This kind of transformation is one of the difficult paradoxes of international law, due to the absence of a legislator at the

115. Khan, op. cit., The Scotsman, 1 June 1982, p.8.

international level, and to the dependence of international law on international practice for its development. It is through international practice that a new general international law may come into existence. While normally insisting on ex injuria non oritur, it is nevertheless accepted in international law that breaches of the law may bring about changes in the law, or that a state may, by breaches of the law acquiesced in by other states, build up a prescriptive or historic right to behave or act in a certain way, as the ICJ found in the Anglo-Norwegian Fisheries Case.¹¹⁶

116. In the Anglo-Norwegian Fisheries Case, the Court held that, assuming that a valid legal case existed (by reason of the geographical character of a coast, generally; or the existence of an island infringe for measuring territorial waters from straight baselines, drawn between two outlying points, instead of from low-water marks along the coast), Norway had acquired a historic right to establish straight baselines in certain regions, irrespective of the general law. ICJ Reports, 1951, p.116. It is precisely through international practice that the straight baselines rule has been established. The following states employ straight baselines: Bangladesh (1974), Bulgaria (1951), Cambodia (1957), Canada (1964), People's Republic of China (hereafter cited as PRC) (1958), Dominican Republic (1952), Ecuador (1938, 1951), Egypt (1951), Finland (1956), Iceland (1948), Indonesia (1971), Iran (1934), Ireland (1959), the Maldives (1975), Mexico (1919), Norway (1812), the Philippines (1961), Portugal (1966), Saudi Arabia (1949), Venezuela (1956), Yugoslavia (1948).

The Republic of Argentina was constituted in 1853, and her claims to the Falklands remained muted throughout the late nineteenth and early twentieth centuries. Was this silence enough to imply acquiescence, just as the ICJ declared in the Temple of Preah Vihear Case, that silence was tantamount to acquiescence?¹¹⁷ Or was there sufficient protest to prevent such a presumption?

In 1946, the election of President Juan Peron of Argentina led to a strong revival of his country's claims to the Falkland Islands.¹¹⁸

Increasing pressure from Argentina during the 1950s and early 1960s led to a review of the position of the Falklands.¹¹⁹

In 1972 the Argentinians struck oil in Patagonia and a number of U.S. and Canadian companies applied to Argentina for oil exploration licences in the seas surrounding the Falkland Islands. A geological survey was made, but the position under international law concerning which state

117. ICJ Reports, 1962, p.24.

118. General Peron got the idea from the success of Nazi wartime propaganda about the Falkland Islands among the German-trained Argentine officer corps. See E.W.H. Christie, 'Letters to the Editor', The Times 1 June 1982, p.15.

119. In 1962, the United Kingdom representative (Mr. Sankey) said in the United Nations that the United Kingdom Government had no doubts concerning its sovereignty over the Falkland Islands. UN General Assembly, 17th Sess. Fourth Committee, 1414th Meeting (7 December 1962), UN Doc. A/c.4/SR.1414, p.4. See also UN General Assembly 18th Sess. 1267th Plenary Meeting (29 November 1963), Provisional Verbatim Record, A/PV. 1267, p.81; UN General Assembly, 20th Sess. 4th Committee, 1558th Meeting (16 November 1965), Provisional Summary Record, A/C.4/SR.1556, p.5.

can licence prospectors remains obscure. On the one hand, the discovery of oil might exacerbate the problem of the Argentine claim; but, on the other hand, it would be indefensible not to exploit the area's natural resources.¹²⁰

On 24 November 1974, the Argentine press reacted emotionally to reports from London that the British Government might be considering granting exploration rights to a Canadian oil company off the Falkland Islands.¹²¹ Two Argentine parliamentary groups suggested that force be used to ensure that any oil deposits found around the Falklands be exploited solely by the Argentine state-owned oil company, YPF. If a rich oil field does exist off the

120. Richard Luce, 'The Falkland Islands', 20 The World Today (1972), pp. 98-101.

121. It is interesting to compare this point with what J. Harding, the Queen's advocate, said in August 1854 viz. that: 'Her Majesty's Government will be legally justified in preventing foreigners from whale and seal fishing within three marine miles (or a marine league) from the coast, such being the distance to which, according to the modern interpretation and usage of nations a cannon-shot is supposed to reach'. Colonial Office 885/3, p.21, No. 19. See D.P. O'Connell and Ann Riordan, Opinions on Imperial Constitutional Law (Australia: The Law Book Co. Ltd., 1971), p.159. Under Art. 1(b) of the 1958 Convention on the Continental Shelf islands are entitled to their own continental shelves. See below, Ch. 6.

islands, the Falklands issue might become more problematic for both the British and Argentine governments.¹²²

The Falkland Islands lie on the continental shelf of the South American continent.¹²³ In reply to a question concerning whether the British Government regarded the sovereignty over the continental shelf around the Falkland Islands as pertaining to Britain, the then Minister of State for the Foreign and Commonwealth Office, Lord Goronwy-Roberts, answered in the affirmative. He answered, 'Yes, my Lords'.¹²⁴

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122. The Times, 20 December 1974, p.6. Lord Shackleton's Survey of the Falkland Islands in 1976 drew attention to the United States Geological Bulletin's estimate that the Falkland Islands might yield up to nine times the proven North Sea oil reserves. See Lord Shackleton, 'Letters to the Editor', The Times, 14 January 1980. See also Sir Bernard Braine, 'Letters to the Editor', The Times, 6 February 1980. Cf. The Guardian, 25 February 1982, p.7; The Scotsman, 24 March 1982, p.5; Sir Donald Logan, 'Resources of the Falkland Islands; the Falkland Islands' Dependencies and Antarctica', in The Falkland Islands Dispute: International Dimensions (London: The Royal Institute of International Affairs), pp. 9-13.
123. James Fawcett, 'Legal Aspects' in The Falklands Dispute: International Dimensions op. cit., pp. 5-8.
124. Hansard, H.L. Debs., Vol. 398, Col. 591: 6 February 1979.

Under the 1958 Geneva Convention on the Continental Shelf and under general international law, the United Kingdom may exercise sovereign rights over the continental shelf appertaining to the Falkland Islands, for the purpose of exploring it and exploiting its mineral resources in the same way as in its other territories. Licences may be issued for these and similar purposes by the governor under local legislation within the 100 fathom line, as defined by the Falkland Islands (Continental Shelf) Order in Council 1950.¹²⁵

On 13 May 1978 an Argentine Navy aircraft and ship intercepted a Polish fishing trawler near the Falklands claiming that they were in Argentine waters. The United Kingdom Under-Secretary of State for the Foreign and Commonwealth Office replied:

We accept neither the Argentine sovereignty claim to the Falklands nor any Argentine right to exercise maritime jurisdiction on the basis of that claim.¹²⁶

125. Hansard, H.C. Debs., Vol. 963, Written Answers, Col. 308: 23 February 1979. In 1978 consent was given to two United States survey companies to carry out a seismic survey around the Falkland Islands. No licences have been issued for the prospecting or extraction of oil. See also ibid., Vol. 946, Written Answers, Cols. 658-59: 23 March 1978. For Falkland Islands (Continental Shelf) Order in Council, see UN Doc. ST/LEG/SER.B/1 (1951), p.305. See below, Ch. 5.

126. Hansard, H.C. Debs., Vol. 951, Written Answers, Cols. 246-47: 8 June 1978.

It is clear that the United Kingdom has no doubt about its sovereignty over the islands despite the fact that the Argentinians have claimed the Falkland Islands over a great many years.¹²⁷

4.4 The Delagoa Bay Arbitration (Great Britain - Portugal)¹²⁸

In 1823 England occupied, in consequence of a so-called cession from native chiefs, a piece of territory at Delagoa Bay which Portugal claimed as part of the territory owned by her, maintaining that the chiefs concerned were rebels. The dispute was not settled until 1875 when the case was submitted to the arbitration of the President of the French Republic. The award was in favour of Portugal, since the interruption of the Portuguese occupation in 1823 was not to be considered as abandonment of a territory over which Portugal had exercised sovereignty for nearly three hundred years.¹²⁹

127. Hansard, H.L. Debs., Vol. 415, Col. 191: 26 November 1980; Col. 199: 27 November 1980; Col. 342: 2 December 1980. See also H.C. Debs., Vol. 994, Written Answers, Col. 201: 27 November 1980; H.C. Debs., Vol. 995, Cols. 195-96: 2 December 1980. On April 2nd 1982 Argentina seized the Falklands by force; the Soviet Union is at present edging towards recognition of Argentine sovereignty over the Falklands. See Hella Pick 'Soviet Union propaganda's move to recognise Argentine sovereignty', The Guardian, 29 May 1982.

128. [1875] 66 BFSP, p.554; Parl. Papers XLII 1875; A. de la Pradelle et N. Politis, Recueil des Arbitrages Internationaux, III (Paris, 1954), p.596.

129. Cf. Case Concerning Sovereignty over Certain Frontier Land (Belgium v. Netherlands)(1959), ICJ Reports, 1959, p.209. See above 4.3.4.

4.5 Island of Trinidad¹³⁰

The island of Trinidad had been discovered by Columbus on 31 July 1496¹³¹ and a Spanish governor had been appointed in 1532. In 1595 it was captured by Sir Walter Raleigh. It was taken from the English by Spaniards in 1676, and foreigners of all nations were invited to settle on the island. In 1781 the island was re-taken by a British force. The Portuguese Government objected to the occupation in 1782, claiming the island as their own. In 1783 a Spanish Proclamation encouraged foreigners to settle and this resulted in a large influx of population, particularly of Frenchmen, from the other parts of the Caribbean. In 1785 a Portuguese garrison of 200 men was stationed on the island and remained till 1795. From that date, the island remained quite uninhabited for a century. After its independence in 1825, Brazil, as the successor of Portugal, claimed that her right of ownership of the island had never been given up and it was declared by the Brazilian Minister of Foreign Affairs that:

130. The right of the British Government to Trinidad depends upon the fact that the island was unoccupied, and belonged to the territory of no state when possession was then taken by Britain. Report by Webster and Finlay to the Foreign Office on 24th October 1895. McNair, op. cit., Vol. I, p.301; Moore, International Law Digest, Vol. I, pp. 299-301.
131. Roberts-Wray, op. cit., p.860; Lorimer, op. cit., Vol. II, pp. 582-83. It is also believed to have been discovered by the pilot, Martin Vaz, in 1503. See Despatch from the Marquess of Salisbury to Mr. Phipps, 18 November 1895. McNair, op. cit., Vol. I, p.303.

Abandonment depends on the intention of relinquishing, or on the cessation of physical power over the thing, and must not be confounded with simple neglect or desertion. A proprietor may leave a thing deserted or neglected and still retain his ownership. The fact of legal possession does not consist in actually holding a thing, but in having it at one's free disposal. The absence of the proprietor, neglect, or desertion does not exclude free disposal, and hence animo retinetur possessio ... Possession is lost corpore only when the ability to dispose of a thing is rendered completely impossible, after the disappearance of the status which permits the owner to dispose of the thing possessed.¹³²

As occupation is acquired by the combination of two elements, of fact and intention, so by dissolution of these elements, or by the manifestation of a contrary fact and intention, it may be extinguished or lost.¹³³

4.6 Navassa Island¹³⁴

Navassa Island lies about thirty miles west of Cape Dammarie at the extreme southwest point of Haiti and eighty-five miles east northeast of Morant Point at the east end of Jamaica. In 1857 Peter Duncan, an American citizen, discovered the island and took possession of it. On 8 December 1859 the United States Secretary of State, under the Guano Acts, issued a certificate for the protection of American citizens engaged in removing guano. Haiti claimed

132. Mr. Carvalho, Brazilian Minister of Foreign Affairs, to Mr. Phipps, 21 July 1895. 1 USFR (1895), pp. 65-67. Moore, International Law Digest, I, pp. 299-301; Hyde, op. cit., p.198.

133. Cf. Dig. L. 17, 153; XLI, 2, 8; see also Robert Phillimore, Commentaries upon International Law, Vol. I (London: William G. Benning & Co., 1854), Ch. XVI, p.307.

134. Ireland, op. cit., p.331; Moore, International Law Digest, I, pp. 366, 577.

the island in 1858, but her protest was denied by the United States on the ground that Haiti had never occupied or asserted jurisdiction over the island before 1857. In the years 1878 to 1901 the receiver of the Navassa Phosphate Company of New York sold its rights.¹³⁵ The Haitians, however, holding that the island had been abandoned by the United States, prevented representatives of the purchasers from landing. At this, the United States declared to Haiti that she had not abandoned the island. It is observed that the title of prescription in another state is often, though not necessarily, founded on the presumed dereliction of the possession by the original owner. This presumption, on the other hand, is liable to be repelled by evidence of a state of facts wholly inconsistent with such a presumption.¹³⁶ In this case, if Haiti suffered by the United States in the latter's unilateral arrangement to deal with the right of possession in question as belonging to the United States, and made no protest against this arrangement, she may be held to have acquiesced in the transaction.¹³⁷

135. In 1898, the island was seized and held by Haitians or Dominicans, who prevented a representative of the Navassa Phosphate Co. from landing and declared that the island no longer belonged to the United States. Despatch of Mr. Dent U.S. Consul at Kingston, July 10, 1898, MSS. Dept. of State 36 MS. Cons. Let., Kingston. See Moore, International Law Digest, I, pp. 577-78.

136. Cf. De Jure Belli ac Pacis, op. cit., Bk. I, ii, Ch. IV, S.VII.

137. For discussion, see MacGibbon, op. cit., 30 BYIL (1953), pp. 293, esp. 306 et seq; Karol Wolfke, Custom in the Present International Law (Wroclaw: Polskiej Akademii Nauk, 1964), pp. 157-65; Anthony A. D'Amato, The Concept of Custom in International Law (Cornell U.P., 1971), pp. 98-102.

4.7 Island of Palmas Arbitration (Netherlands - U.S.A.)¹³⁸

Sovereignty over the Island of Palmas (or Miangas), an island situated in the Pacific Ocean between the archipelagoes of the Philippines and the former Dutch East Indies, was claimed by the United States of America and by the Netherlands. The United States, as successor to Spain, claimed that its original title to the island was based on Spanish discovery and on contiguity to the Philippines. The Netherlands, however, maintained that her claim was founded on certain agreements with the native prince for the establishment by the Netherlands of suzerainty over his territories; that Spain had voluntarily abandoned the island; and that the island had then reverted to the status of res nullius. The Arbitrator, Max Huber, however, did not find that there had been any formal abandonment by Spain of her title. What he found was that the Netherlands had acquired sovereignty. It was not necessary that it should be established as having begun at a precise date. It sufficed that it existed at the critical date. Abandonment is not necessarily dependent on a formal act: it may arise simply from the fact. Title is abandoned by reason of letting another state acquire it.

138. II RIAA, p.831, at pp. 846, 850; Cf. Reply of Mr. Fitzmaurice on the Minquiers and Ecrehos Case, ICJ Pleadings, 1953, Vol. II, p.367; MacGibbon, op. cit., 7 ICLQ (1958), p.508.

The process that causes the one to occur also causes the other to occur, and the title to territory is abandoned by letting another state assume and carry out for many years all the responsibilities and expenses in connection with the territory concerned. The effect of acquiescence may amount to abandonment. Such a course of action, or rather inaction, disqualifies the state concerned from asserting the continued existence of its title. In these circumstances, the original title, however good it may once have been, will inevitably be lost by non-use, and the title will be acquired by that state which exercises it. Thus, in the view of Judge Huber, proof even of a perfect title in past times will not, by reason of the inter-temporal law,¹³⁹ be enough to establish title to territory today, because international law has developed a specific rule that sovereignty must be continuously maintained. This principle was implicitly (and to some extent explicitly) endorsed by the ICJ in the Minquiers and Ecrehos Case.¹⁴⁰ It has two aspects:

139. The validity of title acquired by virtue of customary international law must be judged in the light of the law which obtained at the time of acquisition or purported acquisition of title. Cf. Island of Palmas Arbitration, II RIAA, p.845; Minquiers and Ecrehos Case, ICJ Reports, 1953, p.56. For its application to a question of title see Grisbadarna Arbitration [1915], J.B. Scott, The Hague Court Reports, I, 1916, p.121. See above, Ch. 3.

140. ICJ Reports, 1953, p.47.

(i) discontinuity as constituting (or as evidence of) tacit abandonment of title by desuetude, or as leading to loss of title be derelictio; and (ii) discontinuity as operating to prevent the acquisition of any completed title in the first place, or as evidence that no valid title was ever acquired.¹⁴¹

4.8 Clipperton Island Arbitration (Mexico - France)¹⁴²

This dispute between Mexico and France concerned sovereignty over a small uninhabited lagoon reef in the Pacific Ocean. It had been annexed formally to France in the name of the Emperor Napoleon III by a proclamation of 1858. No further act of sovereignty was shown by France, or by any other power until 1897. In November of that year, a protest was made by France to the United States when it was found that three American citizens were gathering guano

141. Principle of continuity may be an element not merely in the retention, but in the establishment of title. Sir Gerald Fitzmaurice, 'The Law and Procedure of the International Court of Justice, 1951-4: Points of Substantive Law, Part II', 32 BYIL (1955-56), p.66. In the Guatemala-Honduras Boundary Arbitration, the Tribunal held that 'the continued and unopposed assertion of administrative authority by either of the colonial entities ... is entitled to weight and is not to be overborne by reference to antecedent provisions or recitals of an equivocal character', [1933] II RIAA, p.1324. In the Delagoa Bay Arbitration, the French President found in favour of Portugal because Portugal made, inter alia, continual claims to sovereignty over the Bay and upheld her claims by force of arms against both the Dutch and the Austrians. 66 BFSP, p.554. Discontinuance implies abandonment, see Dissenting Opinion of Judge Armand-Ugon in the Case Concerning the Barcelona Traction, Light and Power Company Ltd. (Belgium v. Spain) (Preliminary Objections), ICJ Reports, 1964, p.129.

142. [1931] II RIAA, p.1105. English trans. in 26 AJIL (1932), p.390. See above, 2.1.

on the island and had hoisted the American flag. On 13 December 1897 a Mexican gunboat, The Democrata, landed on the island, with marines under Captain Teofilo Genesta, who found the same three Americans and made them lower the American flag and raise in its place the Mexican flag. France then claimed the island on the basis of its annexation proclamation, while Mexico founded its claim on its succession to a Spanish title of sovereignty which originated from discovery. The dispute was referred to the arbitration of the King of Italy, who awarded Clipperton Island to France on the grounds inter alia that French sovereignty had been acquired effectively in 1858 and had not been abandoned.

As the Award stated:

There is no reason to suppose that France has subsequently lost her right by derelictio, since she never had the animus of abandoning the island, and the fact that she had not exercised her authority there in a positive manner does not imply the forfeiture of an acquisition already definitively perfected.¹⁴³

In this case a period of thirty-nine years had elapsed since 1858, when France had first taken possession; during that time, no acts of sovereignty had been exercised by any other state. Under these circumstances, it was quite right to hold that France's original prise de possession still

143. II RIAA, pp. 1110-11; 26 AJIL (1932), p.394.

subsisted.¹⁴⁴ However, once a clear title based on occupation is held to have been finally and definitively established, it would also seem to result from this Award that abandonment as such would normally have to be express or manifest; abandonment could only be presumed from mere inactivity, continued for long enough to constitute abandonment or leading to an irresistible inference of intention to abandon, even if only acquiescence.¹⁴⁵

144. In the words of the PCIJ 'no other Power was putting forward any claim to territorial sovereignty in Greenland, and in the absence of any competing claim the King's pretensions to be the sovereign of Greenland subsisted'. Eastern Greenland Case, PCIJ, Ser. A/B, No. 53, p.47. Professor Waldock believes the Award of the Clipperton Island Arbitration is correct because France did, in fact, exercise sovereignty again before Mexico attempted for the first time to assert a claim to the island in 1897. But France's complete inactivity for thirty-nine years, even without any external manifestation of sovereignty, would surely have been fatal to her claim in the face of an intervening exercise of sovereignty by another state. Waldock, op. cit., 25 BYIL (1948) p.325.

145. Professor Waldock said that 'an established title may be lost not only by voluntary abandonment but by mere inactivity, that is, by failure to display state activity with a continuity appropriate to the circumstances'. See Waldock, op. cit., 25 BYIL (1948), p.321. Cf. Fitzmaurice, op. cit., 32 BYIL (1955-6), p.67. Professor MacGibbon dealt with the matter in these words '... proof of an intention to abandon a title once perfected may be provided by the continued acquiescence of a state confronted by competing acts of sovereignty'. MacGibbon, op. cit., 31 BYIL (1954), p.168.

4.9 The Legal Status of Eastern Greenland Case¹⁴⁶

In this case, it had been contended on behalf of Norway that, with the disappearance of the two Nordic settlements of Eystribygd and Vestribygd during the fourteenth century, Norwegian sovereignty was lost and the whole of Greenland reverted to terra nullius.¹⁴⁷ The legal basis suggested for this view was voluntary abandonment. The PCIJ held inter alia that there was nothing to show any definite renunciation on the part of the Kings of Norway or Denmark which could be regarded as voluntary abandonment, therefore, abandonment in this case was irrelevant.¹⁴⁸ But as the Judge Ad hoc Vogt rightly observed in his dissenting opinion:

Even admitting that an ancient sovereignty is not forfeited by dereliction, unless the animus is abandoned as well as the corpus possessionis, it must be conceded that the sovereignty could not be still in being some centuries after the extermination of the¹⁴⁹ ancient colonists and the cessation of communications.

146. PCIJ Ser. A/B, No. 53, p.22. See above, Ch. 3.

147. Likewise, in the Clipperton Island Arbitration between France and Mexico, the Arbitrator held that abandonment, by which territory may revert to the status of res nullius, will not be presumed. The Arbitrator further required animus derelinquendi for there to be abandonment. However, it is very doubtful indeed that a state should be able to maintain its title animo solo, II RIAA, p.1108. See above, Ch. 3.

148. PCIJ Ser. A/B, No. 53, p.47.

149. Ibid., p.105. Like occupation, in order that new lands may be appropriated, there must be physical contact with them, or physical contact resumable at pleasure, coupled with an intention to hold them as one's own. Cf. Maine op. cit., p.69.

From the quotation above, it is submitted that there are two major elements of abandonment which are as follows:

- (i) the actual withdrawal from possession (corpus)
- (ii) the intention (animus) of giving up title to sovereignty.

4.10 Case Concerning Sovereignty Over Certain Frontier Land (Belgium - The Netherlands)¹⁵⁰

This was a claim to sovereignty in derogation of title established by treaty. Under the Boundary Convention of 1842, sovereignty resided in Belgium. The question for the ICJ was whether Belgium had lost its sovereignty, by non-assertion of its rights and by acquiescence in acts of sovereignty which were alleged to have been exercised by the Netherlands since 1843. Having examined the question whether Belgium had ever abandoned its sovereignty over the disputed plots, the Court concluded that Belgian sovereignty, which had been established in 1843 over the disputed plots, had not been abandoned.

4.11 Argentine - Chile Boundary Arbitration¹⁵¹

This boundary dispute was concerned with the proper interpretation of a part of the Award of King Edward VII of 20 November 1902.¹⁵² Although the Court of Arbitration

150. ICJ Reports, 1959, p.209, at pp. 227-30. See above, Ch. 3.

151. [1966] XVI RIAA, p.109; 38 ILR (1969), p.10. For summary see R.Y. Jennings 'The Argentine-Chile Boundary Dispute - A Case Study' in International Disputes: The Legal Aspects (London: Europa, 1972), p.315. Cf. D.H.N. Johnson, 'International Arbitration Back in Favour?' 34 YBWA (1980), pp. 322-24.

152. [1902] XI RIAA, p.31.

shared Argentina's view that the reference to 'interpretation and fulfilment' in the compromiso was intended to mean interpretation and fulfilment by the court rather than by the parties, the Court nevertheless rejected Argentina's submission that the material introduced by Chile, to show effective Chilean administration over the disputed area, was completely irrelevant. 'The fulfilment material' submitted by Chile was relevant, but it was insufficient to establish any abandonment by Argentina of her rights under the 1902 Award, or any acquisition of title by Chile through adverse possession of territory adjacent to those parts of the boundary line which were settled in 1902-3.¹⁵³ This case seems to point to the conclusion that any acquisition of title through adverse possession must provide sufficient evidence of the presumed dereliction by the original owner.

4.12 Island of Taiwan

Taiwan is an island off the southeast coast of the Chinese mainland. Together with the 64 islands of the Pescadores Archipelago, 16 islands - including the main island, Taiwan - constitute the Province of Taiwan, which is bounded, to the North, by the East China Sea; to the east, by the Pacific Ocean; to the south, by the Bashi Channel,

153. XVI RIAA, p.173. Cf. Case Concerning Sovereignty over Certain Frontier Land, ICJ Reports, 1959, p.209. See above, Ch. 3.

which separates it from the Philippines; and to the west, by the Taiwan (Formosa) Strait, which separates it from the China mainland.

Taiwan became part of the Chinese Empire in 1683, and remained so until the Treaty of Shimonoseki of 1895,¹⁵⁴ Article 2(b)(c), whereby Taiwan (Formosa) as well as Tiao Yu Tai (Sen'kaku) and the Penghui (Pescadores), were ceded to Japan.¹⁵⁵ The islands were under Japanese sovereignty until 1945. In the Cairo Declaration of 1 December 1943 the Allies declared their 'purpose ... that all the territories Japan has stolen from the Chinese, such as Manchuria, Formosa, [Taiwan] and the Pescadores [Penghui], shall be restored to the Republic of China' (hereafter cited as ROC).¹⁵⁶ By

154. As early as the Qin and Han dynasties in the third century B.C., the Chinese discovered Taiwan and began to settle there. For details, see Ting-yeekuo, 'History of Taiwan', in Hungdah Chiu (ed), China and the Question of Taiwan: Documents and Analysis (New York: Praeger Publ., 1973), pp. 3-24.

155. Art. 2(b) of the 1895 Shimonoseki Peace Treaty provides in part: 'China cedes to Japan in perpetuity and full sovereignty the following territories ... (b) the Island of Formosa, together with all islands pertaining or belonging to the said Island of Formosa'. 1 Hertslets China Treaties (1908), p.363; 87 BFSP, p.799. For discussion, see Harry J. Lamley, 'The 1895 Taiwan War of Resistance: Local Chinese Efforts Against a Foreign Power', in Leonard H.D. Gordon (ed), Taiwan (New York: Columbia U.P., 1970), pp. 23-61.

156. 38 AJIL Suppl. (1944), p.8. The Cairo Conference took place on 22-26 November 1943. The Russians did not attend since they were not at war with Japan. See J.A.S. Grenville, The Major International Treaties 1914-1917 (London: Methuen & Co., 1974), p.222.

an analogy with municipal law, it has been suggested that when the 'thief' surrenders the loot the original owner naturally regains possession.¹⁵⁷ Moreover, para. (8) of the Potsdam Proclamation of 26 July 1945 confirmed that 'The terms of the Cairo Declaration shall be carried out and Japanese sovereignty shall be limited to the islands of Honshu, Hokkaido, Kyushu, Shikoku, and such minor islands as we determine'.¹⁵⁸ In the Instrument of Surrender of 2 September 1945, Japan undertook to carry out the provisions of the Potsdam Proclamation. The Japanese forces in Taiwan thereafter surrendered to the Commander-in-Chief of the ROC.¹⁵⁹ By Article 2(b) of the Peace Treaty of 1951 Japan renounced 'all right, title and claim to Formosa [Taiwan] and the Pescadores [Penghui]';¹⁶⁰ but it did not state

157. In advancing alternate arguments a reference is made to the maxim ex injuria jus non oritur. The implication seems to be that Japan never acquired title to Taiwan, which legally has always belonged to China, despite the temporary Japanese rule of the island under a treaty of cession which was imposed on China by force. See J.C. Hsiung, Law and Policy in China's Foreign Relations: A Study of Attitudes and Practice (Columbia U.P., 1972), pp. 175-80.

158. 13 Dept. of State Bulletin, p.137. Grenville, op. cit., pp. 224-25. The Cairo Declaration was a legally enforceable instrument. According to the view of the PRC, 'when the Chinese Government accepted the surrender of the Japanese armed forces in Taiwan and established sovereignty over the island, Taiwan became, not only de jure but also de facto, an inalienable part of Chinese territory'. See S.C.O.R. V, 490th Sess., p.34.

159. M.M. Whiteman, Digest of International Law, Vol. 3 (Dept. of State Publ., 1964), pp. 486-88.

160. Treaty of Peace with Japan, San Francisco, was signed on 8 September 1951 by forty-eight Allied Powers (excluding the USSR and China). 136 UNTS, No. 1832, p.45. See also Grenville, op. cit., p.283. Dr. Chen considers the signing of the San Francisco treaty without China's participation is a violation of the wartime United Nations Declaration of 1 January 1942 which explicitly forbade any of the Allies to sign a separate peace treaty with the enemy. See Chen/

in whose favour this renunciation was made.¹⁶¹

However, by a separate Peace Treaty between Japan and the Republic of China of 8 August 1952, the sovereignty over the island of Taiwan was transferred from Japan to the ROC.¹⁶² Under Article 2 of this Treaty, it is recognised that Japan renounces all right, title and claim to Taiwan and Penghui (the Pescadores), as well as the Nansha (Spratly) Islands and the Hsisha (Paracel) Islands. It has been suggested that the Tiao Yu Tai (Senkaku) Islands should also be included.¹⁶³

Chen Ti-Chiang, 'Taiwan - A Chinese Territory', Review of Contemporary Law (Brussels), No. 5 (1956), p.42. For details, see Chiu, op. cit., pp. 112-22.

161. Debate on the legal status of Taiwan, see D.P. O'Connell, 'The Status of Formosa and the Chinese Recognition Problem', 50 AJIL (1956), p.405; J.P. Jain, 'The Legal Status of Formosa', 57 ibid., (1963), p.25. F.P. Morello, The International Legal Status of Formosa (The Hague: Martinus Nijhoff, 1966); Tung-Pi Chen, 'Legal Status of Formosa', 4 Philippine International Law Journal (1965), p.99; Poeliu Dai, 'Recognition of States and Governments under International Law with Special Reference to Canadian Post-war Practice and the Legal Status of Taiwan (Formosa)' 3 Canadian YBIL (1965), p.290; D.B. Kirkham, 'The International Legal Status of Formosa', 6 ibid., (1968), p.144. Chiu, op. cit., pp. 127-41; James Crawford, The Creation of States in International Law (Oxford: Clarendon Press, 1979), pp. 143-52. For contrast, see W.M. Reisman & Lung-Chu Chen, 'Who Owns Taiwan: A Search for International Title', 81 Yale L.J. (1971-1972), p.599.
162. 138 UNTS, No. 1858, p.38.
163. When Taiwan and 'all islands appertaining or belonging to' it were ceded to Japan in 1895 as a result of China's defeat in the Sino-Japanese War, the Taio Yu Tai Islands were included in that part of the Chinese territory so ceded. In 1945, when Japan surrendered to the Allies, she accepted the return of the Chinese territories, among them the Tiao Yu Tai Islands, earlier ceded to her. See below, Ch. 7.

In the case of Re Yae Sudo, Judge K. Okuno thus declared that:

Japan waived territorial rights over Formosa [Taiwan] by the acceptance of the Potsdam Declaration, and that the Peace Treaty with Japan and the Peace Treaty between Japan and the Republic of China both confirmed this.¹⁶⁴

Peace Treaties which provide for the redistribution of various of the possessions of the vanquished state have often transferred territorial sovereignty to the joint disposal of the victorious states.¹⁶⁵ But the position of Taiwan after 1945 would seem, on the one hand, to have more in common with an abandonment or derelictio of sovereignty by Japan. On the other hand, the Peace Treaty between Japan and the ROC operates as a complete and final settlement between the parties of the island of Taiwan. The territorial problems are either specifically settled by the peace treaty, or, alternatively, they are in effect settled by each party

164. [1962] Japan, Supreme Court, Grand Bench, 53 ILR (1979), p.514, at p.516.

165. Under the Treaty of Versailles of 1919 for example, Alsace-Lorraine was returned to France, the Saar was placed under an International Commission of the League and the mines of the Saar passed into French ownership; three small territories - Moresnet, Eupen and Malmedy - became Belgian. See Col. Lawrence Martin, The Treaties of Peace 1919-1923, Vol. I (New York: Carnegie Endowment for International Peace, 1924), Pt. II, p.24. Under Pt. I, Sec. I, Arts 1-3, Sec. V, Art. 14 of the Italian Peace Treaty of 1947, the conquest of Albania and Ethiopia were annulled, the Dodecanese ceded to Greece and some Italian islands in the Adriatic were ceded to Greece and to Yugoslavia. Grenville, op. cit., p.277. For further discussion, see G.G. Fitzmaurice, 'The Juridical Clauses of the Peace Treaties', 73 Recueil des Cours (1948-II), pp. 279 et seq. For a historical account, see Sir Walter G.F. Phillimore, Three Centuries of Treaties of Peace and Their Teaching (London: John Murray, 1917).

standing on the status quo as it existed at the end of the war on the basis of the uti possidetis doctrine.¹⁶⁶ It is submitted that the ROC has obtained title to Taiwan by cession, occupation and prescription; and that the Tiao Yu Tai (Senkaku) Islands should also be returned to the ROC,¹⁶⁷ since they were originally ceded together with Taiwan to Japan in 1895.

To sum up: abandonment frees a territory from the sovereignty of the present owner-state. It is effected through the owner-state completely abandoning territory with the intention of withdrawing from it for good. Mere withdrawal from territory per se when there is still the intention of winning it back or resuming occupation, such as the British withdrawal from the Falkland Islands in 1774, would not affect the loss of the territory. However, an intention to abandon a title to territory can be inferred from the circumstances of the supposed withdrawal of state authority, but any acquisition of title through adverse possession must produce sufficient evidence to establish the presumption that the territory had been abandoned by the former owner.

166. Uti possidetis, ita possideatis means 'as you possess, so you shall continue to possess'.

167. See below, Ch. 8.

The principle of effectiveness is necessary for the maintenance of a title. Occupation requires: first, the actual taking into possession (corpus) of territory; and second, the intention (animus) of acquiring sovereignty over it. Similarly, abandonment requires: first, the physical fact of the actual withdrawal from possession of a territory; second, the intention of giving up title to sovereignty over it. But such a rule may well be restricted solely to uninhabited regions such as Clipperton Island and Eastern Greenland. In a less inhospitable territory, it is submitted that dominion will be retained only if the actual possession subsists. Even if discovery had been sufficient to create a valid title in the fifteenth century, the absence of any subsequent manifestation of Spanish sovereignty over the Palmas Island was held to be fatal to the claim of the United States. Moreover, actual abandonment alone does not necessarily involve derelictio as long as it can be presumed that the owner has the will and ability to regain possession of the territory. Thus, for instance, if a rising of natives forces a state to withdraw from a territory, such territory is not abandoned as long as the former possessor is able, and makes efforts to retain possession. It is only when a territory is really abandoned that any state may acquire it through occupation. In the case of Taiwan, Japan renounced its sovereignty over the island, which then either became terra nullius and so was occupied by the Republic of China, or was ceded by Japan to the Republic of China.

With regard to Nansha (Spratly) Islands, it will be seen in Chapter 8 that in 1931, unless the Nansha Islands were still terra nullius - i.e. either China had never appropriated them, or, if it had done so, had subsequently abandoned them - they could not be subjected to occupation.¹⁶⁸ It thus appears that there is no evidence to show that China did abandon the Nansha Islands, either in the animus or in the corpus.

In the next chapter, we shall examine the law and state practice in respect of claims to submarine areas prior to the First United Nations Conference on the Law of the Sea (UNCLOS I).

168. France, on behalf of Vietnam, began to claim the Nansha Islands in 1933, acting on the assumption that these islets were terra nullius. See below, Ch. 9.